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Reciprocal Legitimation in the Federal Courts System

Neil S. Siegel

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Reciprocal Legitimation in the Federal Courts System

Neil S. Siegel*

Much scholarship in law and political science has long understood the U.S. Supreme Court to be the “apex” court in the federal judicial system, and so to relate hierarchically to “lower” federal courts. On that top-down view, exemplified by the work of Alexander Bickel and many subsequent scholars, the Court is the principal, and lower federal courts are its faithful agents. Other scholarship takes a bottom-up approach, viewing lower federal courts as faithless agents or analyzing the “percolation” of issues in those courts before the Court decides. This Article identifies circumstances in which the relationship between the Court and other federal courts is best viewed as neither top-down nor bottom-up, but side-by-side. When the Court intervenes in fierce political conflicts, it may proceed in stages, interacting with other federal courts in a way that is aimed at enhancing its public legitimacy. First, the Court renders a decision that is interpreted as encouraging, but not requiring, other federal courts to expand the scope of its initial ruling. Then, most federal courts

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do expand the scope of the ruling, relying upon the Court's initial decision as authority for doing so. Finally, the Court responds by invoking those district and circuit court decisions as authority for its own more definitive resolution. That dialectical process, which this Article calls "reciprocal legitimation," was present along the path from Brown v. Board of Education to the unreasoned per curiams, from Baker v. Carr to Reynolds v. Sims, and from United States v. Windsor to Obergefell v. Hodges—as partially captured by Appendix A to the Court's opinion in Obergefell and the opinion's several references to it. This Article identifies the phenomenon of reciprocal legitimation, explains that it may initially be intentional or unintentional, and examines its implications for theories of constitutional change and scholarship in federal courts and judicial politics. Although the Article's primary contribution is descriptive and analytical, it also normatively assesses reciprocal legitimation given the sacrifice of judicial candor that may accompany it. A Coda examines the likelihood and desirability of reciprocal legitimation in response to President Donald Trump's derision of the federal courts as political and so illegitimate.

INTRODUCTION.....	1185
I. AN ACCOUNT OF WINDSOR AND OBERGEFELL	1190
A. Federalism as a Way Station.....	1190
B. A Preliminary Defense of the Account.....	1195
II. TWO GENERALIZATIONS OF THE ACCOUNT	1197
A. Judicial Precedent, Legislative Trends, and Public Opinion	1197
B. Public Legitimacy	1202
1. The Segregation Cases	1203
2. The Reapportionment Cases	1206
3. A Failure of Reciprocal Legitimation: The Second Amendment Cases.....	1211
4. Falsification	1214
III. IMPLICATIONS OF THE ACCOUNT AND EXTENSIONS OF THE MODEL.....	1215
A. The (Judicial) Processes of Constitutional Change	1216
B. The Federal Courts System	1221
C. Extensions of the Model.....	1228
IV. RECIPROCAL LEGITIMATION AND JUDICIAL CANDOR	1231
A. A Definition and Defense of a Presumption Favoring Candor	1231
B. Windsor and Obergefell	1237
CONCLUSION.....	1242

CODA: PRESIDENT TRUMP’S POTENTIAL THREAT
TO JUDICIAL INDEPENDENCE 1243
APPENDIX 1247

INTRODUCTION

Given its legal and cultural significance, *Obergefell v. Hodges* has to be one of the most widely read and discussed Supreme Court decisions in recent memory.¹ Yet judging from the reactions in the law reviews, the casebooks, the blogosphere, the media, and even the dissenting opinions in the case, no one seems to have emphasized a potentially significant feature of the majority opinion.² The Court repeatedly implied that it was responding to developments in the federal courts, suggestions that were nothing but the truth. But they were not the whole truth. In all likelihood, the Court itself was partially responsible for causing those developments in *United States v. Windsor*³ and its aftermath.⁴ What is more, the Court may have intended to cause those developments.

In explaining why it had to decide whether states may prohibit same-sex marriage, the Court in *Obergefell* pointed to the existence of a circuit conflict.⁵ And in holding that same-sex marriage falls within the scope of the fundamental right to marry, the Court made clear that it was adopting the majority view in the federal district and circuit courts—all listed in Appendix A to its opinion.⁶ What the Court did not do is acknowledge that all of the federal court rulings in favor of same-sex marriage came after *Windsor*. Nor did the Court acknowledge that its opinion in *Windsor* seemed tailor-made to generating a lopsided circuit split in favor of same-sex marriage. The Court in *Obergefell* seemed to be trying to legitimate its controversial conclusion in part by portraying federal court decisions concerning same-sex marriage as if they were entirely independent of its decision in *Windsor*, when in all likelihood they were not.

1. 135 S. Ct. 2584 (2015).

2. Research has not revealed an account like the one offered here.

3. 133 S. Ct. 2675 (2013).

4. On October 6, 2014, the Court denied certiorari in seven same-sex marriage cases, all of which had resulted in rulings in favor of marriage equality, thus allowing those decisions to go into effect. *See Order List: 574 U.S.*, SUP. CT. U.S. (Oct. 6, 2014), <http://www.supremecourt.gov/orders/courtorders%5C100614zor.pdf> [<https://perma.cc/RR2Y-ZEDQ>].

5. *See infra* note 47 and accompanying text.

6. *See infra* note 48 and accompanying text.

The Court's conduct in *Windsor* and *Obergefell* is not sui generis; it is generalizable in at least two ways, one common and the other uncommon. First, the Court often alters judicial precedent, impacts the course of legislation, or affects public opinion and then later cites those changes in support of its own further conclusions. In so acting, the Court often does not acknowledge that it played a role in producing those changes. Second, when the Court takes on issues that deeply divide Americans, it characteristically takes steps to protect its public legitimacy, often in ways that are not fully candid. One way in which it may do so is by interacting dialectically with other federal courts.

The dialectical nature of the Court's interaction with other federal courts in *Windsor* and *Obergefell* was also evident (with a notable twist) in the conduct of the Court that decided *Brown v. Board of Education*,⁷ the subsequent federal court decisions that expanded the scope of the Court's holding in *Brown* to racial segregation in other public settings, and the Court's unreasoned per curiams that validated the expansion.⁸ A similar dialectic was present (with an important difference) in the Court's reapportionment decisions, beginning with *Baker v. Carr*⁹ and culminating in *Reynolds v. Sims*.¹⁰ By contrast, reciprocal legitimation has so far failed to result from the Court's decisions in *District of Columbia v. Heller*¹¹ and *McDonald v. City of Chicago*,¹² although what the Court intended in those decisions is unclear at this point.

The judicial phenomenon that this Article documents and generalizes can be understood as a process of *reciprocal legitimation*. The process is reciprocal because lower federal courts and the Supreme Court each enlist the support of the other. Specifically, district and circuit courts seek to legitimate their decisions by relying upon an initial Supreme Court decision (e.g., *Windsor*) as authority for expanding the scope of the decision, and the Supreme Court in a later decision (e.g., *Obergefell*) seeks to blunt threats to its own legitimacy by invoking those district and circuit court decisions as authority for validating the expansion.

Reciprocal legitimation takes two basic forms: it is either *intended* by the Court as an original matter, or it is *unintended*. In a case of intended reciprocal legitimation, such as *Brown*, the Court first

7. 347 U.S. 483 (1954).

8. For a discussion of the post-*Brown* per curiams, see *infra* Sections II.B.1 and IV.A.

9. 369 U.S. 186 (1962).

10. 377 U.S. 533 (1964).

11. 554 U.S. 570 (2008).

12. 561 U.S. 742 (2010).

intends for other federal courts to expand the scope of its initial decision and then later relies on those federal court decisions as authority in eventually validating the expansion. In a case of unintended reciprocal legitimization, such as *Baker*, the Court causes other federal courts to expand the scope of its initial decision without intending that result but nonetheless relies upon those federal court decisions as authority in eventually validating the expansion. This Article, while mindful of the perils of speculation absent internal evidence, will suggest that the Court may have intended reciprocal legitimization in *Windsor*. If that is correct, it is worth exploring why the Court deemed it desirable to proceed in that fashion. But even if the Court did not intend reciprocal legitimization in *Windsor*, it set the process in motion, and that process constitutes a potentially important part of how the American constitutional system functions.

The process of reciprocal legitimization has not previously been recognized. The closest idea to it in the law review literature is Professor Richard Re's astute observation that federal courts sometimes narrow Supreme Court precedent because of (among other possibilities) signals from the Court that the precedent should be narrowed.¹³ Re does not suggest, however, that in certain circumstances the Court may invoke the fact of such narrowing as authority for validating it.

The analysis that follows has implications for constitutional law scholarship that emphasizes the role of political forces in identifying mechanisms of constitutional change, including Professor Bruce Ackerman's theory of "constitutional moments," Professors Jack Balkin and Sanford Levinson's theory of "partisan entrenchment," Professor Barry Friedman's theory of the agency of public opinion in shaping the Court's decisions, and Professors Robert Post and Reva Siegel's theory of "democratic constitutionalism."¹⁴ One lesson of recent gay rights litigation is that, to a greater extent than is recognized by any of those theories, constitutional change can be driven not just by political actors, but also by legal elites—by judges. Instead of simply responding to the gestalt or public opinion, judges on different courts may work together to actively shape public opinion through orchestration behind the scenes.

13. See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016). For a review of both Re's article and this one, see Doni Gewirtzman, *The High Power of the Lower Courts*, PUBLIC BOOKS (Dec. 7, 2016), <http://www.publicbooks.org/blog/high-power-lower-courts> [https://perma.cc/3XBC-WNAN].

14. For discussion of those theories, see *infra* Section III.A.

This Article also has implications for scholarship in the fields of federal courts and judicial politics. Much of that scholarship either studies the Supreme Court without regard to its relationship to other courts, or else conceives of the Court and other federal courts as relating hierarchically—as principal and faithful agent—and therefore as constituting distinct institutions with different jobs to do. In contrast to such top-down models, other scholarship takes more of a bottom-up approach, either viewing the lower federal courts as unruly agents or analyzing the phenomenon of issue percolation in the lower federal courts before the Supreme Court decides. As already noted, however, another lesson of recent gay rights litigation (and desegregation and reapportionment litigation before it) is that the Court and other federal courts interact dialectically in interesting ways; they are part of the same federal courts *system*—a system in which lines of communication and influence can run back and forth, not just down or up. If one models that system as consisting of both nodes and links between nodes, the nodes begin to look different—and sometimes appear more, rather than less, alike—when viewed in the light cast by the links. The dialectical, side-by-side model of judicial interactions developed in this Article is distinct from approaches that emphasize either top-down hierarchy or bottom-up resistance or percolation.¹⁵

Part I documents the interaction between the Supreme Court and other federal courts beginning in *Windsor* and culminating in *Obergefell*. Part II generalizes by explaining that this episode is one instance of two larger judicial phenomena. Part III draws implications for the study of constitutional change and the study of federal courts in law and political science. Part III also identifies extensions of the model to state courts and non-judicial actors and to judicial phenomena like experimentation and learning, which can blend into reciprocal legitimation.

This Article is primarily interested in identifying a judicial phenomenon and analyzing its implications, not praising or burying it. Nonetheless, reciprocal legitimation—especially, but not only, its intentional variant—implicates difficult questions about the circumstances in which, and the extent to which, it is permissible for judges to be less than fully candid about what they are doing.¹⁶ Accordingly, Part IV normatively assesses the Court's conduct in

15. For discussion, see *infra* Sections I.B and III.B.

16. See, e.g., David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (defending a strong presumption in favor of judicial candor and citing prominent scholars who have taken an opposing view); cf. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (arguing that judges should be candid but non-introspective).

Windsor and *Obergefell*. The Conclusion summarizes the argument, and a Coda suggests that it is reasonable to anticipate—and to defend—reciprocal legitimation in response to President Donald Trump’s repeated attacks on the legitimacy of federal judges who rule against him.

Before proceeding, however, two clarifications are in order. First, for the most part this Article conceptualizes “the Court,” not individual Justices, as the relevant unit of analysis, even though it is familiar learning that a collegial court is a “they,” not an “it.” The Article proceeds in that fashion for two reasons. First, it is often impossible to know what recently happened at the level of individual Justices. For example, one suspects that Justice Ginsburg asked Justice Kennedy to include some equality reasoning in the majority opinion in *Obergefell*,¹⁷ but that is just speculation, and, even if true, it is also speculative whether Kennedy agreed to do so because he thought it was a good suggestion or because he wanted to avoid separate opinions from Justices in the majority. Second, the idea of collective intent is more coherent than is suggested by academic criticism of the concept (often, but not only, when analyzing claims about original intent).¹⁸ It sometimes (although not always) makes sense to view the members of an institution or organization as sharing an objective, particularly when the institution is composed of a small number of people.¹⁹

Second, where to start a story depends upon one’s purposes in telling it. Just as *Brown* is not the beginning of the Supreme Court’s dismantling of an apartheid social order in the American South, *Windsor* is obviously not the beginning of the Court’s gradual insistence that gay people possess constitutional rights that government is required to respect.²⁰ But *Windsor* is a useful starting point for documenting the reciprocal reliance between the Supreme Court and other federal courts that is the focus of this Article. If the focus were instead on the interactions between the Court and state courts

17. See *infra* note 262 (discussing the equality reasoning toward the end of the majority opinion in *Obergefell*).

18. See generally, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (identifying problems that attend attempts to discover the original intent of the Framers); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (identifying problems that attend ascriptions of unitary intent to multi-member bodies).

19. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 194 (2010) (dismissing the argument that “there is no such thing as ‘collective intent’” as “bad philosophy, bad psychology, and bad law”); *id.* at 194–95 (“[T]o suggest that one can never meaningfully ask what Congress was driving at in this or that statutory provision because Congress is not a collective body is to deny that people can ever share a purpose.”). The “not” in the second parenthetical appears to be a drafting error.

20. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

concerning same-sex marriage, a better starting point would be *Lawrence v. Texas*,²¹ including Justice Scalia's dissent.²² As suggested by Appendix B of the Court's opinion in *Obergefell*, and as explored in Part III.C, some state courts began invalidating bans on same-sex marriage after *Lawrence*.

I. AN ACCOUNT OF *WINDSOR* AND *OBERGEFELL*

A. *Federalism as a Way Station*

As developed elsewhere, the *Windsor* Court appeared to use "federalism as a way station" by "combining equal protection reasoning with the analytical and rhetorical resources of federalism both to self-consciously lean in the direction of marriage equality and to not yet embrace it entirely."²³ On the one hand—the hand that conceives of federalism as limiting federal power—the Court emphasized that the all-purpose restriction of marriage to opposite-sex couples in the federal Defense of Marriage Act ("DOMA") was constitutionally suspect because of its extraordinary interference with state control over domestic relations law.²⁴ That reasoning seemed to imply that the states, not the federal government, are authorized to decide who may marry whom. Chief Justice Roberts, in his dissent, so read the majority opinion.²⁵

On the other hand—the hand that used federalism in the service of living constitutionalism and emphasized the equal dignity of gay people—the Court celebrated the minority of states that were allowing same-sex marriage while ignoring the majority that were banning it; qualified its discussion of state control over domestic relations law by stating three times that states must respect constitutional rights; and emphasized (based on DOMA's title, legislative history, and consequences) that the statute had the purpose, effect, and social meaning of demeaning the dignity of same-sex couples and their children.²⁶ That reasoning seemed to imply that state bans on same-sex marriage are at least as constitutionally problematic as the federal ban

21. *Lawrence*, 539 U.S. at 562–606.

22. See *id.* at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

23. Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 144 (2014).

24. *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013).

25. *Id.* at 2696–97 (Roberts, C.J., dissenting).

26. *Id.* at 2689–95 (majority opinion).

at issue in *Windsor*. Justice Scalia, in his dissent, so read the majority opinion.²⁷

Why did the Court issue such an opinion? As discussed further in the next Section, it is hazardous to speculate about the collective intent of the Justices in the majority absent access to the Court's internal proceedings. But by resisting any dispositive "equality" or "federalism" interpretation and preserving for itself a certain Delphic obscurity, the Court in *Windsor* may have intended to generate a circuit conflict: there was something for both sides in the opinion, and the appellate courts were understood by the Court to be ideologically diverse. What is more, the Court may have intended to create a lopsided split in favor of marriage equality: there was much more in the opinion for gay rights advocates to use than their opponents.²⁸ In addition, public opinion was moving with dispatch in favor of same-sex marriage, as the Court surely knew.²⁹

That, of course, is exactly what happened. Federal courts, in invalidating state bans on same-sex marriage, invoked *Windsor* in two primary ways. (This Article discusses the decisions of the federal circuit courts, not the district courts, both because there are fewer of them and because they are more influential.) First, the Supreme Court in 1972 had held in a one-line summary decision that a state law preventing same-sex couples from marrying did not present a substantial federal question.³⁰ In explaining why that decision, *Baker v. Nelson*, was no longer controlling, appellate courts invoked the Court's decision in *Windsor*, which did not discuss *Baker*. "[S]ince *Windsor* was decided," the U.S. Court of Appeals for the Tenth Circuit reported, "nearly every federal court to have considered the issue—including the district court below—has ruled that *Baker* does not control."³¹ Typical was the

27. *Id.* at 2708 (Scalia, J., dissenting).

28. While this Article analyzes *Windsor*'s impact on federal courts, *Windsor* also empowered other actors who were engaged in the process: gay rights activists, litigants, lawmakers, state officials, and state courts.

29. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), was decided alongside *Windsor*. The Court held 5-4—in an unusual lineup—that the official proponents of Proposition 8, which amended the California Constitution to prohibit same-sex marriage, lacked Article III standing to appeal the district court's order invalidating Proposition 8. *Hollingsworth* is consistent with the interpretation of *Windsor* presented here. Justices Ginsburg, Breyer, and Kagan, who were in the majority in *Hollingsworth*, likely did not want to decide the constitutionality of a state ban on same-sex marriage at that time. By contrast, Justice Kennedy, who dissented (along with Justice Sotomayor, the fifth Justice in the *Windsor* majority), was prepared to reach the merits out of concern for the viability of the initiative process. But he likely would have decided the merits narrowly, perhaps by emphasizing Proposition 8's withdrawal of a right that same-sex couples had previously enjoyed. For elaboration, see Siegel, *supra* note 23, at 135–40.

30. *Baker v. Nelson*, 409 U.S. 810 (1972).

31. *Kitchen v. Herbert*, 755 F.3d 1193, 1206 (10th Cir. 2014).

reasoning of the U.S. Court of Appeals for the Fourth Circuit, which wrote that “[t]he Supreme Court’s willingness to decide *Windsor* without mentioning *Baker* speaks volumes regarding whether *Baker* remains good law.”³²

Second, circuit courts leaned heavily on *Windsor* in ruling in favor of marriage equality either on substantive due process grounds³³ or on equal protection grounds.³⁴ For example, in holding that Virginia’s ban on same-sex marriage violated the fundamental right to marry, the Fourth Circuit reasoned that “*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships.”³⁵ And in holding that Idaho’s and Nevada’s bans on same-sex marriage unconstitutionally discriminated on the basis of sexual orientation, the U.S. Court of Appeals for the Ninth Circuit expressly applied heightened scrutiny,³⁶ which it had previously read *Windsor* to require.³⁷

At the same time, almost every dissenting judge in those cases distinguished *Windsor* as a federalism decision.³⁸ “In *Windsor*,” Judge O’Scannlain of the Ninth Circuit observed, “the Court struck down a federal law that intruded on a state’s prerogative to define marriage.”³⁹ “If anything,” he continued, “*Windsor*’s emphasis on the unprecedented federal intrusion into the states’ authority over domestic relations

32. *Bostic v. Schaefer*, 760 F.3d 352, 374 (4th Cir. 2014).

33. See *Kitchen*, 755 F.3d 1193 (10th Cir. 2014) (2-1) (relying upon *Windsor* in holding that Utah’s ban on same-sex marriage violates the fundamental right to marry); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (2-1) (relying upon *Windsor* in holding that Oklahoma’s ban on same-sex marriage violates the fundamental right to marry); *Bostic*, 760 F.3d 352 (4th Cir. 2014) (2-1) (relying upon *Windsor* in holding that Virginia’s ban on same-sex marriage violates the fundamental right to marry).

34. See *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (3-0) (relying upon *Windsor* in holding that Indiana’s and Wisconsin’s bans on same-sex marriage violate equal protection because they irrationally discriminate against same-sex couples); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (3-0) (relying upon *Windsor* in holding that Idaho’s and Nevada’s bans on same-sex marriage violate equal protection because they unconstitutionally discriminate on the basis of sexual orientation).

35. *Bostic*, 760 F.3d at 377.

36. *Latta*, 771 F.3d at 468.

37. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (3-0) (holding that *Windsor* requires courts to subject classifications based upon sexual orientation to heightened scrutiny).

38. Judge Niemeyer of the Fourth Circuit used *Windsor* somewhat differently. See *Bostic*, 760 F.3d at 392, 396 (Niemeyer, J., dissenting) (reading *Windsor* as recognizing “the inextricable, biological link between marriage and procreation,” and emphasizing that the “Court made no change as to the appropriate level of scrutiny in its more recent decision in *Windsor*”).

39. See *Latta v. Otter*, 779 F.3d 902, 908 (9th Cir. 2015) (O’Scannlain, J., dissenting from denial of reh’g en banc) (emphasis omitted) (quoting *Baker v. Nelson*, 409 U.S. 810 (1972)).

reaffirms *Baker*'s conclusion that a state's definition of marriage presents no 'substantial federal question.'"⁴⁰ Along similar lines, Judge Kelly of the Tenth Circuit asserted that "*Windsor* protected valid same-gender, state law marriages based on federalism concerns, as well as Fifth Amendment due process and implied equal protection concerns."⁴¹ "Given an unusual federal intrusion into state authority," he reasoned, "the Court analyzed the nature, purpose, and effect of the federal law, alert for discrimination of 'unusual character.'"⁴²

In the wake of those appellate decisions, the Supreme Court further nudged the federal courts in the direction of marriage equality by denying certiorari in all of them.⁴³ The Court also remarkably declined to stay the judgments of courts in subsequent cases that ruled in favor of same-sex marriage.⁴⁴ From a realist perspective, those last moves made it inconceivable that the Court would subsequently issue a decision effectively un-marrying thousands of couples it had just freed to marry. When the U.S. Court of Appeals for the Sixth Circuit generated the split by reading *Windsor* as imposing no constitutional limits on the states,⁴⁵ the Court granted certiorari.

In resolving the circuit conflict, the Court in *Obergefell* listed in Appendix A the many federal court decisions that had addressed state bans on same-sex marriage; it did not acknowledge that those decisions—in contrast to the state legislation and judicial decisions listed in Appendix B—were overwhelmingly decided post-*Windsor*.⁴⁶ Nor did it acknowledge that all of the federal court decisions invalidating state bans were post-*Windsor*. The Court referenced Appendix A three times in its opinion. It explained that there was both

40. *Id.*

41. *Kitchen v. Herbert*, 755 F.3d 1193, 1235 (10th Cir. 2014) (Kelly, J., dissenting) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013)).

42. *Id.* (quoting *Windsor*, 133 S. Ct. at 2693); see *Bishop v. Smith*, 760 F.3d 1070, 1109 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part) (adhering to his views in *Kitchen*).

43. See *Order List*, 574 U.S., *supra* note 4 (citing the Order List from October 6, 2014).

44. See, e.g., Lyle Denniston, *Court Won't Add to Delay of Florida Same-Sex Marriages*, SCOTUSBLOG (Dec. 19, 2014, 7:34 PM), <http://www.scotusblog.com/2014/12/court-wont-add-to-delay-of-florida-same-sex-marriages/> [<https://perma.cc/L6HQ-2FCH>] ("In refusing the request by Florida officials, the Court followed the pattern that it had maintained for the past two-and-a-half months of routinely turning aside requests to put on hold lower court rulings that had struck down state bans on same-sex marriage.").

45. See *DeBoer v. Snyder*, 772 F.3d 388, 413–15 (6th Cir. 2014) (2-1) (upholding restrictions on same-sex marriage in Michigan, Ohio, Kentucky, and Tennessee using the following reasoning: "Why was DOMA anomalous? Only federalism can supply the answer. The national statute trespassed upon New York's time-respected authority to define the marital relation Today's case involves no such [divesting] of a marriage status granted through a State's authority over domestic relations within its borders . . .").

46. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608–11 (2015).

a split that needed resolving⁴⁷ and a majority view in the circuits that it was adopting.⁴⁸ The Court largely took itself out of the deliberative interactions it described.

For example, in rejecting the argument that it should await further developments before declaring a right to same-sex marriage, the Court detailed the participation of almost every actor but itself in debates over same-sex marriage:

There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.⁴⁹

The Court portrayed the opinions of the federal courts as having been informed directly or indirectly by the arguments of litigants, lawyers, and society—not in part by the Court itself in *Windsor*.

In sum, the Court in *Obergefell* invoked the authority of the many federal court decisions that had invalidated state prohibitions on same-sex marriage, which in turn had relied on the Court's own decision in *Windsor*. The Court did not disclose the existence of any reciprocal reliance—of any reciprocal legitimation. It instead presented federal court decisions as independent developments to which it was

47. See *id.* at 2606 (“Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry.”).

48. See *id.* at 2597:

With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*;

see also *id.* at 2593 (“Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*.”).

49. *Id.* at 2605.

required to respond in order to ensure uniformity in the interpretation of important questions of federal law.⁵⁰

It is common, although not inevitable, for the Court to invoke the prevailing view in the circuits as confirming its own conclusion—for example, when it rejects the position of an outlier circuit.⁵¹ What is different about the phenomenon discussed here is that the Court, through its decision in *Windsor*, likely played a causal role in determining which view would prevail in the circuits. What is also potentially different is that the Court may have intended to do so.

B. A Preliminary Defense of the Account

The foregoing interpretation is unlikely to satisfy scholars who are skeptical of claims of subjective judicial intent—and for good reason. Absent “smoking gun” evidence, which is currently unavailable, it is impossible to establish the subjective intent of any—let alone all—of the five members of the *Windsor* majority. It remains possible that the Court was uncertain about what to do, was simply awaiting further developments and learning, and was pushing its decision off for another day, which came sooner than expected. That interpretation seems unable to account for the extent to which the majority opinion in *Windsor* leaned in the direction of marriage equality, but perhaps another interpretation can.

It matters if the Court in *Windsor* intended what followed, both because it raises the question of why it acted with such an intent (see Part II.B), and because such an intent may affect a normative assessment of the Court’s conduct (see Part IV). But it also matters that reciprocal legitimation subsequently occurred regardless of the intent of the *Windsor* majority. That is, even if the Court in *Windsor* caused subsequent events without intending to do so, other federal courts still invoked its decision as authority for invalidating state bans on same-sex marriage, and the Court in *Obergefell* still invoked those decisions as authority in validating the result that most federal courts had reached.

50. A different dialogue took place among judges on the appellate courts themselves, who invoked developments in sister circuits. See, e.g., *DeBoer v. Snyder*, 772 F.3d 388, 430 (6th Cir. 2014) (Daughtrey, J., dissenting) (“These four cases from our sister circuits provide a rich mine of responses to every rationale raised by the defendants in the Sixth Circuit cases as a basis for excluding same-sex couples from contracting valid marriages.”).

51. See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 853 (2003) (“In reading the Court’s opinions, one sometimes finds statements to the effect that a particular decision accords with, or departs from, the views of most of the lower courts.”).

The foregoing interpretation of events is also unlikely to satisfy empiricists. It is difficult to demonstrate empirically the extent to which the Court's opinion in *Windsor* caused the reactions of the federal courts in its wake (just as it is difficult to establish the causal relationship between those reactions and the Court's opinion in *Obergefell*). Perhaps the Court and other federal courts were moving independently in response to the same general conception of human rights⁵² or the same changes in public opinion, which were reflected in the position of the Obama Administration that classifications drawn on the basis of sexual orientation warrant heightened scrutiny.⁵³ Although this Article cannot rule out that possibility, it likely does not tell the whole story. The probable consequences of the Court's decision in *Windsor* were predictable—and were predicted—at the time it was decided.⁵⁴

As Professor Katie Eyer observes, moreover, "[T]he history of gay equality claims in the lower federal courts suggests that such courts may be slower and more hesitant than the Supreme Court to make doctrinal moves responsive to broader shifts in constitutional culture, particularly in the absence of some clear doctrinal signal from the Court itself."⁵⁵ *Windsor* offered such a signal, even if (perhaps by design) it was not an entirely clear one. It was clear enough to embolden willing federal judges to go where they wanted to go—and where, perhaps, their grandchildren wanted them to go. (The fact that those federal judges wanted to decide in favor of marriage equality is what makes the legitimation reciprocal, as opposed to one-sided.) But the Court's signal

52. The Court may be making such an appeal when it cites foreign law. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

53. See Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 215 (2013) ("[T]he Obama intervention seems to have been received by the lower courts, in the absence of authoritative guidance from the Supreme Court, as a signal that heightened scrutiny is once again a respectable—if perhaps not mandatory—doctrinal approach.").

54. See, e.g., Siegel, *supra* note 23, at 133–34:

Over the next year or two, some more socially conservative or cautious judges may uphold certain state bans on same-sex marriage by distinguishing *Windsor* on the grounds advanced by Chief Justice Roberts and discussed in Part 2. But one can also expect other such bans to continue to fall, generating splits of authority and returning the question to the Court

In his *Windsor* dissent, Justice Scalia predicted that the Court would invalidate all state prohibitions on same-sex marriage in the near future. See *infra* note 236.

55. Eyer, *supra* note 53, at 216.

was not so clear as to effectively require unwilling federal courts or judges to go there as well.

Is it accurate to characterize the Court as involved in persuasion, not compulsion, when it is an authority vis-à-vis the group (other federal courts) with which it is communicating? A skeptic might wonder what kind of communication from the Court would count as persuasion that would not also count as either precedent or strongly worded dicta. Such skepticism draws attention to the important point that hierarchy is always present to a non-trivial extent, and a fuller discussion of the issue must await Part IV.B. For now, it is worth reiterating that the *Windsor* Court seemed to go out of its way to offer something to both sides in the debate over same-sex marriage, even as it offered more to one side. In addition, there is a difference between a nudge and a shove. The *Windsor* Court, in essence, offered a nudge.

II. TWO GENERALIZATIONS OF THE ACCOUNT

Although the short amount of time that elapsed between *Windsor* and *Obergefell* may be uncommon and indeed dizzying, little else about the Court's behavior in those cases is unprecedented. This Part identifies two ways, one common and the other not, in which the Court's conduct constitutes one instance of more general judicial phenomena.

A. Judicial Precedent, Legislative Trends, and Public Opinion

First, when the Court seeks to alter substantially the course of the law, and even when it has no such conscious intention initially, it may affect the content of potential sources of legal authority—including judicial precedent, legislation trends, and public opinion—only to later invoke those changes in support of more aggressive doctrinal conclusions. For example, the Court in *McLaughlin v. Florida* justified its invalidation of a state law that punished interracial cohabitation more severely than intraracial cohabitation by citing (among other decisions) *Brown v. Board of Education*,⁵⁶ whose holding a decade

56. *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964):

[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. . . . Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., . . . *Brown v. Board of Education*

earlier the Court had expressly limited to the field of public education.⁵⁷ Three years later, the Court invoked *McLaughlin* in striking down anti-miscegenation statutes in *Loving v. Virginia*.⁵⁸ Similarly, the Court in *Roper v. Simmons* overruled earlier precedent permitting the juvenile death penalty by invoking, among other things, its intervening decision in *Atkins v. Virginia*, which prohibited the execution of the intellectually disabled.⁵⁹

Examples of that kind of move abound not just in constitutional law, but also in the field of federal courts. For example, after the Court in *Seminole Tribe of Florida v. Florida* held that Congress is barred from using most of its Article I powers to override the states' sovereign immunity from suit in federal court,⁶⁰ the Court in *Alden v. Maine* held that, given *Seminole Tribe*, it would be anomalous to allow Congress to use those same powers to abrogate state immunity in state court.⁶¹ Dissenting, Justice Souter called out the Court for bootstrapping its way to an unjustified conclusion:

The short and sufficient answer is that the anomaly is the Court's own creation: the Eleventh Amendment was never intended to bar federal-question suits against the States in federal court. The anomaly is that *Seminole Tribe*, an opinion purportedly grounded in the Eleventh Amendment, should now be used as a lever to argue for state sovereign immunity in state courts, to which the Eleventh Amendment by its terms does not apply.⁶²

Using past decisions as authority for further extensions is broader than bootstrapping and is common.⁶³ It is the progression of precedent

57. 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

58. 388 U.S. 1, 10 (1967):

We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. Florida*, 379 U.S. 184 . . . (1964).

59. See *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989), and relying in part on *Atkins v. Virginia*, 536 U.S. 304, 312–13, 317–21 (2002)):

[T]o the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was . . . inconsistent with the premises of our recent decision in *Atkins*.

(citations omitted).

60. 517 U.S. 44, 44–46 (1996).

61. 527 U.S. 706, 752 (1999).

62. *Id.* at 800 n.33 (Souter, J., dissenting).

63. Bootstrapping occurs when "an actor undertakes permissible action Y and thereby renders its action Z legally permissible, as the actor's undertaking of Z absent Y would raise serious legal problems." Stuart Benjamin, *Bootstrapping*, L. & CONTEMP. PROBS., 2012, at 115,

characteristic of common law constitutionalism.⁶⁴

When the Court leverages judicial precedent as justification for further expansions, it may seem relatively obvious (although see below) that the Court is responsible for having caused previous changes in the doctrine because the Court is citing itself. Likewise, the Court's emphasis on reliance interests as one of several considerations in decisions about stare decisis transparently exemplifies the feedback loop discussed here. The Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that when it reexamines a previous decision, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."⁶⁵ Among other questions, the Court asks "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."⁶⁶ The Court is thus candid about its own previous role in causing other actors to behave in ways that it is currently taking into account in preserving a particular result.

Another "*Casey*" factor that the Court considers is changes in the law: "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."⁶⁷ As justification for overturning precedent, the Court may invoke tensions in the doctrine and countervailing lines of precedent, even though it obviously contributed to those tensions. An example from constitutional

116. Reciprocal legitimation need not be an instance of bootstrapping so defined. For example, it was not necessary for the Court to issue its holding in *Windsor* in order to render its holding in *Obergefell* legally unproblematic. Rather, it was *Lawrence* that deemed moral opposition to homosexuality an illegitimate state interest. See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . ." (quoting with approval *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). Part of what is noteworthy about reciprocal legitimation is that the Court proceeds in stages even though it is not legally required to do so. On the other hand, if one defines bootstrapping in terms of the Court's public legitimacy instead of its legal legitimacy, see *infra* Section II.B, then the instances of reciprocal legitimation discussed in this Article are also instances of bootstrapping, with the interesting wrinkle that multiple courts are involved in the process.

64. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (describing his theory of common law constitutionalism). For earlier expressions of his theory, see David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

65. 505 U.S. 833, 854 (1992).

66. *Id.*

67. *Id.* at 855.

law is *Lawrence v. Texas*.⁶⁸ The Court reasoned that “[t]wo principal cases decided after *Bowers* cast its holding into even more doubt,”⁶⁹ and proceeded to discuss *Casey* and *Romer v. Evans*.⁷⁰ An example from the field of federal courts is *Monell v. Department of Social Services*,⁷¹ which overruled the holding of *Monroe v. Pape* that municipalities may not be sued under 42 U.S.C. § 1983.⁷² The *Monell* Court reasoned in part that “our cases—decided both before and after *Monroe* . . .—holding school boards liable in § 1983 actions are inconsistent with *Monroe*,” so that “it can scarcely be said that *Monroe* is so consistent with the warp and woof of civil rights law as to be beyond question.”⁷³

Again, when the Court invokes its own precedent, it may seem obvious that the Court is relying upon changes that it caused. It may not, however, always be so obvious. One should recall that the Court is a “they,” not an “it,” not just at a particular point in time, but also over time. It may not be apparent to all consumers of its opinions whether the Court is citing a previous Court or the current one.

The Court can have an impact on the course of legislation that is similar to its impact on the course of judicial precedent, and it may subsequently take advantage of that impact without being entirely candid about what is going on. Perhaps the best example is Eighth Amendment jurisprudence, where the Court expressly looks in part to objective indicia of “evolving standards of decency” in order to determine whether a national consensus rejects a particular punishment for a particular crime.⁷⁴ For example, in holding in *Kennedy v. Louisiana* that the Constitution categorically prohibits the death penalty for child rape, the Court emphasized that only six states permitted capital punishment for that offense.⁷⁵ In dissent, Justice Alito charged that “this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents.”⁷⁶ Dicta in the Court’s decision thirty years earlier in *Coker v. Georgia*,⁷⁷ he explained,

gave state legislators and others good reason to fear that any law permitting the imposition of the death penalty for this crime would meet precisely the fate that has now

68. 539 U.S. 558 (2003).

69. *Id.* at 573–74 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

70. *Id.* at 574–76 (discussing *Romer v. Evans*, 517 U.S. 620 (1996)).

71. 436 U.S. 658 (1978).

72. 365 U.S. 167, 191 (1961).

73. *Monell*, 436 U.S. at 696.

74. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

75. 554 U.S. 407, 426 (2008).

76. *Id.* at 448 (Alito, J., dissenting).

77. 433 U.S. 584 (1977) (holding that the Eighth Amendment prohibits the death penalty for the rape of an adult woman).

befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators—regardless of their own values and those of their constituents—from supporting the enactment of such legislation.⁷⁸

The Court is also characteristically not candid about its previous role in causing legal or social change when it invokes shifts in public opinion. The Court has a history of first affecting public opinion (admittedly, in complex ways⁷⁹) and then later citing those effects in support of more controversial conclusions. One example is the Court's notation in *Loving* of the fourteen states that had repealed their prohibitions on interracial marriage over the previous fifteen years.⁸⁰ That development was likely affected by the Court's decisions leading up to, including, and following *Brown*.

Relatedly, the Court may affect public opinion in ways that it later invokes in order to maintain constitutional commitments it had previously made. An example is the Court's invocation in *Grutter v. Bollinger* of a widespread societal commitment to "diversity,"⁸¹ an ostensibly non-remedial justification for affirmative action that Justice Powell fashioned in *Regents of the University of California v. Bakke*⁸² at a time when universities were expressly defending affirmative action admissions programs on remedial grounds.⁸³ Another example is the Court's reaffirmation of *Miranda v. Arizona*⁸⁴ in *Dickerson v. United States*.⁸⁵ The Court there declared—in a majority opinion by Chief Justice Rehnquist, no previous friend of *Miranda*—that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."⁸⁶

Reciprocal legitimation is like the foregoing phenomena in that the Court invokes changes that it played a part in causing without

78. *Kennedy*, 554 U.S. at 448 (Alito, J., dissenting).

79. For discussion of the difficulties encountered in trying to discern the impact of Court decisions on public opinion, see Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 8–14 (Nathaniel Persily et al. eds., 2008).

80. See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

81. 539 U.S. 306, 328–32 (2003).

82. 438 U.S. 265 (1978).

83. See, e.g., Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1489 (2007) (documenting the efforts of the University of California in *Bakke* to justify affirmative action in higher education in terms of the remedial logic of past discrimination).

84. 384 U.S. 436 (1966).

85. 530 U.S. 428 (2000). *Dickerson* was itself the product of an interaction between the Supreme Court and extrajudicial actors. See Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 61–65.

86. *Dickerson*, 530 U.S. at 443. The Court has undermined *Miranda* in other ways. See generally Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

candidly admitting as much. Reciprocal legitimation is distinct, however, in that it involves a particular kind of relationship that the Court establishes with other federal courts when it perceives threats to its public legitimacy, and so is less common. The next Section documents instances in which the Court forged—or did not forge—such a relationship.

B. Public Legitimacy

There is a second way in which the Court's conduct in *Windsor* and *Obergefell* is generalizable. When the Court intervenes to decide a question on which American constitutional culture is deeply divided, the Court often takes measures to safeguard its public legitimacy.⁸⁷ Public legitimacy is distinct from legal legitimacy because each "is constituted by its collective acceptance" in the minds of a distinct audience.⁸⁸ As Professor Richard Fallon has explained, "When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms."⁸⁹ "As measured by sociological criteria," Fallon continues, "the Constitution or a claim of legal authority is legitimate insofar as it is accepted . . . as deserving of respect or obedience—or . . . is otherwise acquiesced in."⁹⁰ Public legitimacy turns on whether non-legal actors, including the general public, different regions of the country, and government officials, view judicial decisions as deserving of respect or obedience or otherwise acquiesce in them.⁹¹

87. For discussion, see generally Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008). Of course, the Court may not succeed. For example, scholars still debate the efficacy of the *Brown* Court's actions.

88. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 117–18 (1995) ("[I]nstitutions survive on acceptance.").

89. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005).

90. *Id.* at 1790–91; see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001):

[T]he work of constitutional judges must have both "legal" and "social" legitimacy. Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered.

(footnote omitted).

91. See, e.g., Post & Siegel, *supra* note 83, at 1473 (observing that the law can be apprehended "from the internal perspective of a faithful practitioner and from the external perspective of the general public," and that "if the social legitimacy of the law as a public institution resides in the latter, the legal legitimacy of the law as a principled unfolding of professional reason inheres in the former").

One way in which the Court may seek to shore up its public legitimacy is by participating in the process of reciprocal legitimation, which may initially be either intentional or unintentional. This Section canvasses a successful instance of intended reciprocal legitimation, a successful instance of unintended reciprocal legitimation, and a recent failure to achieve reciprocal legitimation that may or may not have initially been intended.

Before beginning the case studies, it is important to note that whether the words of a judicial opinion have any particular empirical effect, such as enhancing the public legitimacy of the issuing court, depends upon what Professor J.L. Austin called the *perlocutionary* force of those words. Austin observed that the perlocutionary force of speech turns on “what we bring about or achieve by saying something, such as convincing, persuading, [or] deterring.”⁹² The perlocutionary force of a judicial opinion is a matter of contingent causality that depends, among other things, upon how exactly the court speaks. For the Court’s speech to affect its public legitimacy, it is not necessary to assume that the public carefully parses Supreme Court opinions. Rather, it is necessary to assume only that the content of the Court’s opinion is relevant to the perlocutionary effect of its speech. It is no doubt true that the meaning of the Court’s opinions is conveyed to the public in complex, highly mediated ways.

1. The Segregation Cases

The *Brown* Court sought to protect its public legitimacy in numerous familiar ways. It set the case for re-argument twice, and it expended great efforts to publicly project unanimity even though the Justices were divided. The Court also expressly limited the holding to education (as noted above), did not moralize about a moral issue, and allowed desegregation “with all deliberate speed.”⁹³

The *Brown* Court took those actions because it was concerned about the extent to which Southern politicians and citizens would comply with federal court orders to desegregate Southern public schools. The Court was less troubled by the prospect that a broader ruling condemning all state-mandated segregation would be unconvincing to legal professionals. Indeed, because purporting to limit

92. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 108 (2d ed. 1975).

93. See RICHARD KLUGER, *SIMPLE JUSTICE* 682 (2d ed. 2004) (quoting Chief Justice Warren as explaining to his colleagues at the conference after re-argument that it would be “[u]nfortunate if we had to take precipitous action that would inflame more than necessary”). See generally, e.g., *id.* at 545–750 (discussing the *Brown* litigation when it reached the U.S. Supreme Court).

Brown's rationale to education predictably subjected the Court to harsh criticism from legal luminaries,⁹⁴ the Court was willing to sacrifice a portion of its legal legitimacy in order to shore up its public legitimacy. Reciprocal legitimation concerns threats that the Court may at times perceive to its public legitimacy, not its legal legitimacy. The *Brown* Court was most concerned about protecting its public legitimacy, as was the *Windsor* Court when it declined to rule more broadly—say, by holding that discrimination on the basis of sexual orientation triggers heightened scrutiny.⁹⁵

Brown is an extreme case because the Court perceived that its public legitimacy was under extreme stress. But evidence of similar behavior is discernible in *Windsor* and *Obergefell*. As documented in the previous Part, the Court's opinion in *Windsor* may have been designed to set in motion the process of reciprocal legitimation, and, in any event, that is what happened: the Court and other federal courts invoked one another as authority in attempting to legitimate a controversial decision in the face of divided public opinion. That strategy is potentially risky for the Court because other federal courts may decline the Court's invitation. But they also may accept it, as *Windsor* and *Obergefell* illustrate.

Notably, the reciprocal legitimation technique is also exemplified (albeit with an important twist) by *Brown*, the subsequent federal court decisions that expanded the scope of the Court's holding in *Brown* to racial segregation in other public settings, and the Court's per curiams that validated the expansion. As noted, the Court decided *Brown* in a way that self-consciously did not necessarily condemn all de jure racial segregation, all racial classifications, or all practices of racial subordination.⁹⁶ During the opinion drafting process, Chief Justice Warren rejected a proposed addition offered by Justice Jackson because Warren "felt it could be interpreted as being directed toward segregation in general, not only in public education."⁹⁷ Warren wrote that the Court was limiting the rationale to education even though he clearly knew that the basic issue was much broader, and that the Court was encouraging litigants and federal judges to read it broadly. Among

94. Learned Hand and Herbert Wechsler were perhaps the two most prominent critics of *Brown* in the American legal community. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959) (quoting LEARNED HAND, THE BILL OF RIGHTS 54 (1958)).

95. Matters are more complex for interpretive theories that render public legitimacy part of legal legitimacy. The account offered here assumes they are separable, at least at a given point in time.

96. See *supra* note 57 (quoting the *Brown* Court's limitation of its holding to education).

97. KLUGER, *supra* note 93, at 701.

other things, *Plessy v. Ferguson*, whose reasoning the Court was rejecting, involved segregation in railroad cars.⁹⁸ And almost immediately after *Brown*, the Court vacated the judgment of an appellate court that had upheld segregation in municipal recreational facilities and remanded for reconsideration in light of *Brown*.⁹⁹

In short order, many other federal courts leaned on the authority of *Brown* in expanding the scope of its holding to segregation in other public spaces in Southern life¹⁰⁰—for example, public beaches and bathhouses,¹⁰¹ intrastate bus systems,¹⁰² and public parks and golf courses.¹⁰³ In response, the Court leaned on those federal court decisions so heavily that it did not issue opinions and offer its own reasons. Instead, the Court simply affirmed the decisions summarily with citations to *Brown*,¹⁰⁴ while infamously postponing consideration of the constitutionality of anti-miscegenation laws.¹⁰⁵ Fearful that giving reasons or condemning anti-miscegenation statutes so soon after *Brown* would only make Southern resistance more massive, the Court waited eleven years to speak loudly in *Loving*.¹⁰⁶ In the interim, the Court's legitimacy became more secure,¹⁰⁷ and so the Court developed

98. 163 U.S. 537, 538 (1896).

99. See *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (mem.) (per curiam), *vacating and remanding* 202 F.2d 275 (6th Cir. 1953).

100. Of course, federal courts also leaned on the authority of *Brown* in enforcing the decision. See generally, e.g., JACK BASS, *UNLIKELY HEROES* (1981) (documenting the federal judges—especially on the Fifth Circuit—who implemented *Brown* in six Southern states); KLUGER, *supra* note 93, at 749 (“[P]ractically speaking, [the Court] placed effective control of the undertaking in the hands of Southerners themselves—the fifty-eight federal judges manning the twenty-eight United States District Courts and two Courts of Appeals circuits, the Fourth and the Fifth, serving the South.”).

101. See *Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386, 386–87 (4th Cir. 1955).

102. See *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956).

103. See *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir. 1958).

104. See *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (mem.) (per curiam), *aff'g* 252 F.2d 122 (5th Cir. 1958); *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (mem.) (per curiam), *aff'g* 220 F.2d 386 (4th Cir. 1955); *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956); see also *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (mem.) (per curiam) (desegregating municipal golf courses by requiring the district court to enter a decree in conformity with *Dawson*), *vacating and remanding* 223 F.2d 93 (5th Cir. 1955).

105. See *Naim v. Naim*, 350 U.S. 985 (1956) (mem.) (per curiam) (dismissing for want of a properly presented federal question a constitutional challenge to Virginia's ban on interracial marriage).

106. See *supra* note 58 and accompanying text (discussing *Loving*).

107. For discussion of the significant changes in American society between 1954 and 1967 that helped legitimate *Brown*, see AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 214–15 (2012).

sufficient confidence to write per curiam opinions invalidating segregation in various settings.¹⁰⁸ Exuding self-confidence in *Loving*, the Court reinterpreted *Brown* as having condemned racial classifications that reinforce inferior social status.¹⁰⁹

2. The Reapportionment Cases

Another example of reciprocal legitimation, albeit one that was not initially intended, is the reapportionment decisions of the 1960s, which were decided in the shadow of massive resistance to *Brown*. Prior to the 1960s, many state legislatures were severely malapportioned, with districts of vastly different populations. As cities and suburbs grew in population, election districts were not redrawn to reflect the population changes. For example, fifty thousand people might elect a representative in one district while two hundred and fifty thousand people in another district elected a representative to the same legislature. The same malapportionment problem existed in congressional districts in states across the country.¹¹⁰

Writing in 1946 for the Court in *Colegrove v. Green*, Justice Frankfurter admonished that “[c]ourts ought not to enter this political thicket” of legislative reapportionment, lest the public legitimacy of the court be imperiled.¹¹¹ By 1961, his position had not changed, and he attempted to sway Justice Stewart to his side while *Baker v. Carr*¹¹² was pending before the Court. He wrote to Justice Stewart that judicial

108. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (“[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities. State-compelled segregation in a court of justice is a manifest violation of the State’s duty to deny no one the equal protection of its laws.” (citations to *Brown* and subsequent decisions omitted)); *Turner v. City of Memphis*, 369 U.S. 350, 352–53 (1962) (per curiam) (holding that statutes and regulation articulating state policy promoting racial segregation in public restaurants violates the Fourteenth Amendment).

109. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”); see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1478–80 (2004) (demonstrating that the anticlassification and antisubordination principles were understood to be closely connected in the years before and after *Brown*). *Loving* reflects the ambiguity present in *Brown* and *Bolling* regarding what sort of mediating principle of equality the Court was enforcing. On that question, as opposed to the geographic scope of the no-segregation principle, the *Brown* Court was unlikely to have been intending reciprocal legitimation because the Court, like the broader legal community, was unable to clearly discern that potentially competing principles were at stake until subsequent disputes arose over disparate impact and affirmative action.

110. For a recent discussion of this history by the Court, see *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123–24 (2016).

111. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

112. 369 U.S. 186 (1962).

intervention threatened to “bring the Court in conflict with political forces and exacerbate political feelings widely throughout the Nation on a larger scale, though not so pathologically, as the Segregation cases have stirred.”¹¹³ Justice Frankfurter would later write in dissent in *Baker* that “[t]he Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”¹¹⁴ “Such feeling,” he continued, “must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”¹¹⁵

Justice Frankfurter failed to persuade Justice Stewart, and the Court forged ahead over Justice Frankfurter’s objections, notwithstanding reasonable concerns that state legislatures or Congress might not comply with federal court orders to reapportion.¹¹⁶ In responding to reapportionment cases, the Court proceeded in stages. First, it held in *Baker v. Carr* only that reapportionment challenges were justiciable, leaving it to other courts to initially decide whether to insist upon population equality, something close to equality with permissible deviations for sufficient cause, mere rationality, or some other standard.¹¹⁷ In rejecting the applicability of the political question doctrine, Justice Brennan wrote in part for the majority that “[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”¹¹⁸ The Solicitor General and counsel for the plaintiffs

113. J. DOUGLAS SMITH, ON DEMOCRACY’S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT “ONE PERSON, ONE VOTE” TO THE UNITED STATES 80 (2014); see *id.* at 83 (noting that, at the second argument in *Baker*, Justice Frankfurter warned that judicial intervention in segregation cases would prove “simpler” than intervention in reapportionment would be, and that he rhetorically asked Solicitor General Archibald Cox whether he thought “the prejudices on this business of urban versus rural, which is just as strong in New York as it is in Tennessee, isn’t even more deep-seated and more pervasively deep-seated”).

114. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting).

115. *Id.*

116. For descriptions of the fraught political context in which the Court operated, see Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1115–22 (2002); Mark V. Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1231–32 (2002).

117. See *Baker*, 369 U.S. at 237.

118. *Id.* at 226.

had urged the Court to adopt a deferential approach.¹¹⁹ At that point, however, the Court was deciding only the question of justiciability.

Although “[s]ome commentators criticized the Court for laying down no more specific guidelines for lower courts to follow,” Professor Gordon Baker, writing in 1966, opined that the Court’s forbearance “may have been a calculated and perceptive move.”¹²⁰ “By letting state and lower Federal courts tackle the specific problems in particular states,” Baker explained, “the supreme tribunal would be able to gauge the reactions—both political and judicial—before moving farther.”¹²¹ He added that the Court “must have been impressed with the ensuing flood of litigation,” as well as with “the alacrity with which many lower court judges moved to correct alleged malapportionments.”¹²² Political scientist Martin Shapiro was less pleased with the Court, opining that it “has, in a sense, not kept its word to those of its defenders who have relied on the initially limited arguments” and that “[i]t remains to be seen whether or not the tactical advantage gained by its ‘delayed action’ approach will compensate for the Court’s loss of that precious political asset, a reputation for candor.”¹²³

Judging from the inside account of the Court’s deliberations recently offered by Professor J. Gordon Smith, however, the reason the Court decided only the issue of justiciability in *Baker* appears to have had much to do with unstable internal Court dynamics.¹²⁴ Justice Brennan initially needed Justice Stewart’s vote in order to secure a majority, and Justice Stewart did not want to decide more than the issue of justiciability. Whatever the reasons for Justice Stewart’s minimalism (among other possibilities, perhaps Justice Frankfurter’s lobbying took a toll), Justice Brennan no longer required Justice Stewart’s vote when Justice Clark changed his mind after unsuccessfully attempting to write a dissent. What is more, Justice Clark expressed willingness to decide not only the issue of justiciability, but also the merits. After talking with Chief Justice Warren, however, Justice Brennan decided not to redraft the majority opinion so late in the term. Perhaps Justice Brennan did not push for a broader ruling at

119. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 503 (2015) (explaining the litigation positions of the parties and the Court’s response).

120. GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT 123–24 (1966).

121. *Id.* at 124.

122. *Id.*

123. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 250–52 (1964). Shapiro was criticizing both *Brown* and *Baker*.

124. This paragraph draws from SMITH, *supra* note 113, at 86–89. For a similar account, see BERNARD SCHWARTZ & STEPHAN LESHER, INSIDE THE WARREN COURT 1953–1969, at 183–98 (1983).

least in part because he perceived strategic advantage in delay—whether because he had intended reciprocal legitimation in mind, or because he did not want to alienate Justice Stewart. It also seems likely, however, that the Court would have issued a broader ruling had Justice Clark initially joined the majority. Moreover, there were not yet five votes for “one person, one vote,”¹²⁵ so the Court could not then have been proceeding with that ultimate objective in mind.

Whatever the best explanation for the limited nature of the Court’s intervention in *Baker*, the “short-term response” to it was “nothing short of astonishing.”¹²⁶ Writing in 1962, Professor Robert McCloskey observed that “[n]ot only federal judges, but state judges as well, have taken the inch or so of encouragement offered by the Supreme Court and stretched it out to a mile,” for “[l]egislatures all over the country have been bidden to redistrict or to face the prospect of having the judiciary do the job for them.”¹²⁷ In all, there were “more than seventy legislative and congressional reapportionment lawsuits filed in forty states in the aftermath of *Baker v. Carr*.”¹²⁸ *Baker* set in motion a process, the next phase of which entailed federal and state judges leaning on its authority in moving toward population equality.

The final phase began when those decisions returned to the Court. Over the next few years, the Court decided the merits of various apportionment scenarios, roughly in order from least controversial to most controversial. In *Gray v. Sanders*,¹²⁹ the Court invalidated Georgia’s primary election law and county unit system.¹³⁰ Writing for the Court, Justice Douglas declared that “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”¹³¹ In *Wesberry v.*

125. SMITH, *supra* note 113, at 216 (“Five votes for the more sweeping standard did not exist prior to the confirmation of Byron White and Arthur Goldberg.”); *id.* (“As late as 1962, almost no one involved in reapportionment litigation even contemplated population equality in both houses of a bicameral legislature.”).

126. Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Cases*, 76 HARV. L. REV. 54, 56 (1962). This piece contains a long footnote, *see id.* at 56–58 n.14, that reports on then-pending litigation and legislative action in the wake of *Baker*.

127. *Id.* at 57–58.

128. SMITH, *supra* note 113, at 139.

129. 372 U.S. 368 (1963).

130. Georgia’s law “technically governed the running of primaries for statewide offices such as governor, lieutenant governor, and U.S. senator. But in practice it ensured that a rural minority maintained almost absolute control of the urbanizing state.” SMITH, *supra* note 113, at 103–04.

131. *Gray*, 372 U.S. at 381; *see id.* at 382 (Harlan, J., dissenting):

When [*Baker*] was argued at the last Term we were assured that if this Court would only remove the roadblocks of [*Colegrove*] and its predecessors to judicial review in

Sanders, the Court turned its attention to the House of Representatives,¹³² agreeing with the dissenter on the three-judge district court, who had “relied on *Baker v. Carr*.”¹³³ In a majority opinion written by Justice Black, the Court held that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”¹³⁴

More controversially, in *Reynolds v. Sims*, the Court expanded the scope of the principle of population equality to state legislative districts.¹³⁵ The Court held that, “as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”¹³⁶ Writing for the Court, Chief Justice Warren observed that “[t]he spate of similar cases filed and decided by lower courts since our decision in *Baker* amply shows that the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States.”¹³⁷ The Court added in a footnote that “[l]itigation challenging the constitutionality of state legislative apportionment schemes had been instituted in at least 34 States prior to the end of 1962—within nine months of our decision in *Baker v. Carr*.”¹³⁸

The Court in *Reynolds v. Sims* did not expressly cite numerous federal and state court decisions as authority for its own resolution, as it did in *Obergefell*. As just noted, however, the Court did lean on federal and state court decisions in documenting the scope of the “problem . . . that is perceived to exist.” The Court did not acknowledge that *Baker* likely played a role in producing that perception, even as the Court observed that those decisions were rendered after *Baker*. As Professor Gordon Baker reported, moreover, “the ‘consensus of lower courts’ in

“electoral” cases, this Court in all likelihood would never have to get deeper into such matters. State legislatures, it was predicted, would be prodded into taking satisfactory action by the mere prospect of legal proceedings. These predictions have not proved true.

132. The constitutional text defeated application of the principle of “one person, one vote” to the U.S. Senate. See U.S. CONST. art. I, § 3. For a discussion, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1283–85 (2015).

133. 376 U.S. 1, 4 (1964).

134. *Id.* at 7–8.

135. 377 U.S. 533 (1964).

136. *Id.* at 568; see also *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 734–37 (1964) (requiring population equality in the apportionment of districts in both houses of a bicameral legislature, regardless of whether a majority of the state electorate approves an apportionment scheme that deviates from population equality in one house).

137. *Sims*, 377 U.S. at 556.

138. *Id.* at 556 n.30 (citing, *inter alia*, Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706–10 (1963), and emphasizing that it “contains an appendix summarizing reapportionment litigation through the end of 1962”).

moving toward representative equality” was a major theme of oral arguments in reapportionment cases that term.¹³⁹ Thus, the reapportionment cases appear to be another instance in which the Court intervened in stages and interacted dialectically, not simply hierarchically, with other federal (and state) courts.

In another way, the majority opinion in *Reynolds v. Sims* quietly sought to ameliorate threats to the Court’s public legitimacy. Chief Justice Warren offered the reassurance that controversies over reapportionment did not simply involve “urban-rural conflicts,” notwithstanding how they “are generally viewed.” This was because “fast-growing suburban areas . . . are probably the most seriously underrepresented in many of our state legislatures,” and because “[m]alapportionment can, and has historically, run in various directions.”¹⁴⁰ Those observations were irrelevant to the constitutional question, as Warren acknowledged.¹⁴¹ But he included them anyway.¹⁴²

3. A Failure of Reciprocal Legitimation: The Second Amendment Cases

The Court’s Second Amendment jurisprudence is an area in which, at least so far, reciprocal legitimation has failed to materialize.¹⁴³ In *District of Columbia v. Heller*, the Court held that the Second Amendment protects an individual right to possess a firearm, including a handgun, in the home for purposes of self-defense.¹⁴⁴ Two years later, in *McDonald v. City of Chicago*, the Court held that the right declared in *Heller* satisfies the requirements for incorporation and so applies to the states.¹⁴⁵

In the wake of those decisions, federal district and circuit courts have almost always rejected Second Amendment claims. “Regardless of the level of scrutiny that has been applied,” the Law Center to Prevent Gun Violence reports, “nearly all of these [post-*Heller*] cases have one

139. BAKER, *supra* note 120, at 125.

140. *Sims*, 377 U.S. at 567 n.43.

141. *See id.*

142. *Reynolds v. Sims* generated a political firestorm that included various threatened responses, including a proposed constitutional amendment that would have partially reversed the result. The proposal fell just short of passage by the Senate in 1965, and all other efforts to reverse the decision “failed and failed quickly.” HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: VOLUME II: RIGHTS AND LIBERTIES* 569 (2013).

143. Another such example is *United States v. Lopez*, 514 U.S. 549 (1995). For a discussion, see generally Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came*, 2000 WIS. L. REV. 369.

144. 554 U.S. 570 (2008).

145. 561 U.S. 742 (2010).

thing in common: the Second Amendment challenge has been rejected and the statute at issue has been upheld.”¹⁴⁶ “Of the more than 900 cases tracked by the Law Center,” this source continues, “96% have rejected the Second Amendment Challenge.”¹⁴⁷ Based in part on the data, Professor Richard Re describes *Heller* as having “been narrowed from below.”¹⁴⁸

It is not clear, however, what the Court in *Heller* and *McDonald* was intending to accomplish. It is possible that the story to date of those decisions is one in which the federal courts have largely rejected the Supreme Court’s invitation to expand the scope of Second Amendment rights. As an initial matter, the Court may have had judicial legitimacy on its “mind.” Although in 2008 there was significant public support for some form of Second Amendment right,¹⁴⁹ the Court was significantly changing constitutional law when it declared for the first time in American history that the Second Amendment protects an individual right of firearm possession in the home for self-defense purposes. The consequences of such a declaration for the prevention of crime, mass killings, accidents, and suicides were far from certain.

It is also possible that the Court was attempting to move the federal courts in the direction of a relatively robust understanding of Second Amendment rights without yet requiring them to enforce such an understanding. Writing for the majority in *Heller*, Justice Scalia emphasized, for example, that “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁵⁰ He also declared it “not debatable” that “it is not the role of this Court to pronounce the Second Amendment extinct.”¹⁵¹ Those statements may have been intended to encourage the federal courts in an opinion that was self-conscious not to “clarify the entire field”¹⁵² or “undertake an exhaustive historical analysis today of the full

146. *Post-Heller Litigation Summary*, LAW CTR. TO PREVENT GUN VIOLENCE 6 (Mar. 31, 2015), <http://smartgunlaws.org/wp-content/uploads/2014/11/Post-Heller-Litigation-Summary-March-2015-Final-Version.pdf> [<https://perma.cc/R5K8-TN7BJ>].

147. *Id.*

148. Re, *supra* note 13, at 961–63.

149. According to a USA Today/Gallup Poll conducted in February 2008, “A solid majority of the U.S. public, 73%, believes the Second Amendment to the Constitution guarantees the rights of Americans to own guns. Twenty percent believe the amendment only guarantees the rights of state militia members to own guns.” Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx> [<https://perma.cc/LF53-P8DBJ>].

150. 554 U.S. 570, 635 (2008).

151. *Id.* at 636.

152. *Id.* at 635.

scope of the Second Amendment.”¹⁵³ Most significantly, the Court did not announce a level of scrutiny or indicate whether the right to possess a firearm for purposes of self-defense extends outside the home. Those questions, and others, were left to federal district and circuit courts, as well as state courts.

The Court also included qualifications in its opinion that can perhaps be understood to reflect the fact that the Court was only attempting to persuade other federal courts for the time being instead of coercing them. The Court stated that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁵⁴

The Court also “recognize[d] another important limitation on the right to keep and carry arms”—namely, that “the sorts of weapons protected were those ‘in common use at the time,’” a limitation that the Court thought was “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”¹⁵⁵

An alternative interpretation of the foregoing evidence, however, is that *Heller* and *McDonald* were compromises among the Justices in the majority and that the qualifications Justice Scalia included were the price of a fifth vote (and perhaps a fourth as well). Notably, *Heller*, like *United States v. Lopez*,¹⁵⁶ was a case in which the lower courts moved the law first and forced the Court’s hand.¹⁵⁷ There apparently were, and continue to be, significant disagreements among the members of the *Heller* majority. In recent years, fractures within that majority have been aired publicly with increasing frequency. Recently, the Court held narrowly (and without briefing or argument) that the explanation offered by the Supreme Judicial Court of Massachusetts in upholding a state law prohibiting the possession of stun guns contradicted *Heller* and *McDonald*. The Court merely vacated the judgment of the state court and remanded for further

153. *Id.* at 626.

154. *Id.* at 626–27.

155. *Id.* at 627 (citations omitted).

156. See *supra* note 143 (noting that *Lopez* is another instance in which lower federal courts have declined to expand the scope of the Court’s decision).

157. See *United States v. Lopez*, 2 F.3d 1342, 1367–68 (5th Cir. 1993) (holding that federal statute banning gun possession on school grounds was beyond the scope of the Commerce Clause); *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007) (holding that the District of Columbia’s restrictions on firearms violated the Second Amendment).

proceedings.¹⁵⁸ By contrast, Justice Alito, in an opinion joined by Justice Thomas, concurred only in the judgment, criticizing “[t]his Court’s grudging *per curiam*,” which “now sends the case back to that same court.”¹⁵⁹ The Court had not previously granted certiorari in a Second Amendment case in the wake of *Heller* and *McDonald*, and it sometimes denied certiorari over public dissents.¹⁶⁰

One lesson of *Heller* and *McDonald* is that there will be situations in which one cannot know, at least not yet, how best to understand majority opinions that seemingly point in different directions in circumstances in which the Court may be concerned about its public legitimacy. As Professor Martin Shapiro’s misinterpretation of *Baker* suggests,¹⁶¹ such situations are most likely to arise when the decisions are recent and so internal evidence of the Court’s deliberations is unavailable. It seems unlikely, however, that one will always be in that situation. There is persuasive evidence, discussed above, indicating what the *Brown* Court was attempting to accomplish. And although a cautionary tale of this Part is that one cannot be equally confident about judicial motivations regarding recent events, there has been no indication to date (even as it remains possible) that the majority in *Windsor* was internally divided in a way suggesting that the decision was a compromise, as opposed to an invitation. Unlike the situation in *Baker*, moreover, it seems improbable that there were vote switches while *Windsor* was pending before the Court.

4. Falsification

The foregoing case studies involve different categories of reciprocal legitimation or else its absence. They also implicate a variety of potential kinds of evidence of intended or unintended reciprocal legitimation, including the level of public controversy over an issue, the sequencing of judicial opinions by different courts, a close textual

158. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*). According to the *per curiam* opinion, even though the Court in *Heller* had held that the Second Amendment right extends to arms that did not exist at the time of the Founding and to arms that are not useful in warfare, the state court held that stun guns are outside the scope of the Second Amendment right because they were not in common use when the amendment was ratified and because they are not adaptable for use in the military. *See id.*

159. *Id.* at 1033 (Alito, J., joined by Thomas, J., concurring in judgment).

160. *See, e.g., Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari) (“Despite these holdings [in *Heller* and *McDonald*], several Courts of Appeals—including the Court of Appeals for the Seventh Circuit in the decision below—have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes.”).

161. *See supra* text accompanying note 123 (quoting Shapiro).

analysis of the reasoning and citations in those opinions, and (where available) the Court's internal deliberations. Finally, the case studies involve differences in the potential threats to the Court's public legitimacy, including dangers emanating from the general public, the populations of particular regions of the country, and government officials. What binds the examples together and makes them at least potential candidates for reciprocal legitimization is the particular three-stage sequencing of judicial decisions by different courts in a judicial hierarchy in circumstances in which the public legitimacy of those courts may be perceived by the judges to be in question. Specifically, the Supreme Court in the initial stage decides less than it is authorized to decide while potentially signaling to the lower courts that they should expand the scope of the Court's holding at the second stage. If lower courts do so and invoke the Court's initial decision as authority, and if the Court validates the expansion and invokes those lower court decisions as authority, then it seems likely, although not certain, that reciprocal legitimization has taken place.

As noted at the end of Part I, it can no doubt be difficult to falsify such a conclusion. But it is not in principle impossible. For example, judges may speak in an extrajudicial capacity about what they were intending to accomplish or avoid, and their internal deliberations may eventually become available. In addition, alternative explanations for why a judicial opinion is written in a certain way may be viewed as more or less persuasive. And good empiricists may fashion creative ways of testing the causal relationships—between the initial Supreme Court decision and lower court decisions, and then between those lower court decisions and the ultimate Supreme Court decision—that are part of a claim of reciprocal legitimization. In any event, a theoretical account of occasional judicial behavior can be informative even if it is difficult to falsify. Such an account can be useful when the evidence for it is at least suggestive and it is among the best accounts of an observable practice that are currently available, even if one cannot be certain about its accuracy.

III. IMPLICATIONS OF THE ACCOUNT AND EXTENSIONS OF THE MODEL

This Part identifies two implications of the account of reciprocal legitimization offered in this Article for scholarship about the federal courts in law and political science. The first implication concerns the processes of constitutional change, which include a greater role for the agency of judges than is recognized in several prominent accounts in the literature. The second implication concerns the nature of the

relationship between the Supreme Court and other federal courts, which at certain times is more dialectical and less top-down or bottom-up than is commonly supposed.

This Part also identifies extensions of the model of judicial interactions proposed here. The model can be expanded to include state courts and non-judicial actors. It can also be extended to include certain judicial phenomena that can blend into reciprocal legitimation—specifically, experimentation and learning.

A. The (Judicial) Processes of Constitutional Change

Prominent theorists of constitutional change disagree about how such change takes place. According to Professor Bruce Ackerman, constitutional change occurs rarely and over relatively short periods of time. Ackerman has developed a descriptive and normative theory of “constitutional moments,” according to which Americans live in a “dualist democracy.” During pivotal periods in American history, Ackerman argues, ordinary politics is displaced by a constitutional politics in which a movement party in control of one branch of the national government defeats opposition expressed by another branch and succeeds in persuading the American people to amend the Constitution outside the Article V process of formal amendment. Whereas the Republican Congress was in command during Reconstruction (and it subdued President Andrew Johnson and the Supreme Court), President Franklin Delano Roosevelt led constitutional change during the New Deal (and he eventually defeated the Court).¹⁶²

By contrast, other theorists understand constitutional change as occurring relatively frequently and incrementally over potentially longer periods of time. For example, Professors Jack Balkin and Sanford Levinson have articulated a descriptive theory of “partisan entrenchment” to explain routine, gradual changes in constitutional law that they believe are characteristic of how the American constitutional system functions. According to their theory, the president’s power to nominate Justices and other federal judges means that the party controlling the White House can, if it chooses, appoint federal judges with roughly similar ideological orientations on issues of greatest significance to the party (subject to a potential check from the

162. For Ackerman’s comprehensive work on this theory, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998), and 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

Senate). Over time, that process can produce substantial changes in constitutional law.¹⁶³

Because those two theories differ over the primary mechanism and pace of constitutional change, they also differ in the extent to which they regard constitutional change as democratic. Ackerman views constitutional moments as embodying democratic self-governance because they involve focused efforts by the American people to refashion the meaning of important parts of the Constitution. For Balkin and Levinson, by contrast, constitutional change is only roughly democratic because it tends to unfold over an extended period of time, and there is typically a lag between when the governing party decides what it wants to accomplish and when the federal courts respond. The two theories also have different objectives. Whereas Ackerman is concerned to establish both how constitutional change occurs and when it is legitimate, Balkin and Levinson purport only to describe how it happens.

For all of those differences between the theories, they share an important similarity. For both, it is political actors, not legal actors, who primarily drive constitutional change. That is especially true of Ackerman. His focus is on presidents, Congresses, and their associated social movements, which either tame each other or the Court. He is explicit that he is not interested in “judges talking to one another about the relationship of past decisions to present problems.”¹⁶⁴ Indeed, because Ackerman is a kind of originalist (with more, and more recent, Foundings to account for than most originalists), his judges play a preservationist and synthetic role; neither his descriptive nor his normative story acknowledges the phenomenon of judicial politics or imagines that judges can play a leading role in constitutional development.¹⁶⁵

Federal judges play substantially more of a role in producing constitutional change in Balkin and Levinson’s theory of partisan entrenchment: judges are the ones who are entrenched by partisans in the White House and, potentially, the Senate. For Balkin and Levinson as well, however, political actors are the primary drivers of constitutional change. Balkin and Levinson emphasize the role of the

163. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001).

164. ACKERMAN, FOUNDATIONS, *supra* note 162, at 20.

165. See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 48 (2007) (“The possibility of judicial politics or the judiciary as an active agent of constitutional development creates severe problems for his normative and historical narrative, and Ackerman takes pains to marginalize it.”).

governing political coalition, whose bidding judges may eventually do. For them, in other words, judges are agents, not principals.

Like Balkin and Levinson, Professor Barry Friedman offers a positive theory, not a normative one. Also like them, he focuses on the agency of forces outside the judiciary in shaping constitutional law. Specifically, Friedman argues—in line with a large literature,¹⁶⁶ but more exhaustively—that the Supreme Court follows public opinion, at least in general, over the long run, and on salient issues.¹⁶⁷ Similar to Balkin and Levinson's theory, each of those qualifications leaves some room for the Court's own agency.¹⁶⁸ Friedman's basic point, however, is that the Court is acted upon far more frequently than it acts.

Professors Robert Post and Reva Siegel situate courts in a more active role. They have developed their theory of “democratic constitutionalism” to explain and “express the paradox that constitutional authority depends on both its democratic responsiveness and its legitimacy as law.”¹⁶⁹ “Americans,” they write, “want their Constitution to have the authority of law, and they understand law to be distinct from politics.”¹⁷⁰ Moreover, “they understand that the rule of law is rooted in professional practices,” including those of judges, “that are distinct from popular politics.”¹⁷¹ Even so, Post and Siegel stress—and this is their main point—that if the public comes to view the Supreme Court's interpretation of the Constitution as wholly unresponsive to popular commitments, then “the American people will in time come to regard it as illegitimate and oppressive, and they will act to repudiate it as they did during the New Deal.”¹⁷² Post and Siegel,

166. The seminal work is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). More recent examples include THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989), and THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT (2008).

167. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

168. See Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. 583, 595 (“All of Friedman's qualifications are well conceived, but each pays tribute to the very [counter-majoritarian] difficulty he means to deny.”).

169. Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 27 (Jack M. Balkin & Reva B. Siegel eds., 2009) (emphases omitted) [hereinafter Post & Siegel, *Democratic Constitutionalism*]. For a more elaborate development of their theory, see generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

170. Post & Siegel, *Democratic Constitutionalism*, *supra* note 169, at 27.

171. *Id.* at 27–28.

172. *Id.* at 28; see also *id.* at 25–26 (writing that “important aspects of American constitutional law evolve in response to substantive constitutional visions that the American people have mobilized to realize,” and that “these responsive features of the law help sustain the Constitution's authority in history”).

like Balkin in his more recent work on living originalism,¹⁷³ seek to provide an account that encompasses the influence of both judicial and non-judicial actors on the fashioning of constitutional law. Their emphasis, however, is more on the responsiveness of constitutional judges to democratic forces than it is on the capacity of such judges to shape constitutional politics.

There is a sense in which all of these theories are obviously correct to focus on extrajudicial actors. Throughout American history, changes in political commitments have led to changes in constitutional law in various ways. First, Article V amendments are rare but have sometimes proven possible. Second, electoral politics results in acts of constitutional interpretation and institution building by the political branches, as well as the appointment of judges, as Balkin and Levinson explain. Third, segments of the public may engage in efforts to change social norms, whether through social movement advocacy, litigation, or both. Fourth, norm contestation may also occur through the rhetoric of presidents and other influential politicians. “To succeed in changing social norms,” Balkin has more recently observed, “may be as powerful as changing judges and politicians, for it alters the underlying sense of what is reasonable and unreasonable for governments to do. It shifts political and professional discourse about what is off-the-wall and on-the-wall in making claims on the Constitution.”¹⁷⁴ For example, during the period extending from *Windsor* to *Obergefell*, the Supreme Court and other federal courts were deciding same-sex marriage cases in a context in which public opinion was moving—with remarkable dispatch—in the same direction as almost all of those courts. In that respect, *Obergefell* is not a counter-majoritarian decision.

Even so, the Court did not simply validate a national consensus by bringing outliers into line.¹⁷⁵ Throughout the relevant period, American culture remained regionally divided over the legitimacy of same-sex marriage. Indeed, public opinion remains divided today.¹⁷⁶ Accordingly, *Obergefell* was an anti-federalist decision: if not for the

173. JACK M. BALKIN, LIVING ORIGINALISM 70–72 & 360 n.8 (2011) (embracing democratic constitutionalism not only as an accurate descriptive account, as Post & Siegel do, but also as a normative account of why the constitutional system possesses democratic legitimacy).

174. *Id.* at 71.

175. For a discussion of constitutional outliers and guidelines for proper use of the term, see Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014).

176. In a Gallup poll conducted May 4–8, 2016, thirty-seven percent of respondents expressed the view that same-sex marriage should not be recognized by the law as valid, sixty-one percent expressed the opposite view, and two percent had no opinion. *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/Marriage.aspx> (last visited Feb. 25, 2017) [<https://perma.cc/66JJ-P8J4>].

intervention of the federal courts, most states would likely prohibit same-sex marriage today. Given that reality, it is insufficient to look nearly exclusively at political actors, social movements, or public opinion in explaining how constitutional change occurred.

According to the account offered in this Article, legal elites—judges—played a prominent role in bringing about and legitimating constitutional change. They neither enforced the Constitution as amended in the most recent constitutional moment, nor vindicated the constitutional commitments of the governing political coalition that installed certain judges and Justices in the late 1980s and early 1990s.¹⁷⁷ Indeed, contrary to the partisan entrenchment thesis, the Appendix to this Article documents that Republican appointees in the Second, Fourth, Seventh, and Tenth Circuits voted to invalidate federal or state restrictions on same-sex marriage. Only the voting by panel members on the Sixth and Ninth Circuits conformed to partisanship-based predictions without exception.

Nor did judges who voted to invalidate prohibitions on same-sex marriage simply follow public opinion or deeply felt popular commitments. Although those judges did respond to significant, more recent changes in cultural values, they also likely played a role in causing those changes. And they did so in part by working together and orchestrating events behind the scenes—by leaning on one another for support as they intervened in the conflict over same-sex marriage.¹⁷⁸ Justices drew support from other federal judges who in turn had drawn support from them, all the while normalizing in the public consciousness the idea that same-sex marriage is constitutionally protected through media reports of repeated (indeed, seemingly daily) judicial invalidations. Theories of constitutional change are incomplete to the extent that they, like many other participants and observers, do not recognize the fascinating interaction between the Supreme Court and other federal courts that recently took place.

177. Ackerman's theory does not seem able to capture the forces that produced *Obergefell*. Balkin and Levinson's theory can account for the role of the Sotomayor and Kagan confirmations, and those of recently appointed federal judges who voted to invalidate state bans on same-sex marriage.

178. Cf. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 731 (2012) ("[C]onstitutional change and political and social mobilizations are so intertwined that, in interpreting and applying legal doctrine, judges are influenced by—and, in turn, influence—notions about constitutional meaning that originate outside the courts.").

B. The Federal Courts System

Much scholarship in law and political science has long studied the Supreme Court without regard for its relationship to other courts, or else has understood the Court and other federal courts to relate hierarchically.¹⁷⁹ A famous example of a scholar who studied the Court in relative isolation is Alexander Bickel, who had only the Court in mind when he advocated that it deploy the “passive virtues,” such as creative application of standing doctrine, in order to protect legal principles from being warped by the need to maintain the public legitimacy of the Court.¹⁸⁰ At the end of a long chapter in the same book that coined the phrase “the countermajoritarian difficulty” (thereby helping spawn a cottage industry in constitutional theory for the next half century), Bickel noted that “I have not addressed myself, in this chapter or elsewhere, to the role of the lower federal courts, of which the Supreme Court is the hierarchical head.”¹⁸¹ For Bickel, the relevant “conversation” was “between the Court and the people and their representatives,”¹⁸² not between different courts.

To the extent that Bickel considered the relationship between the Court and other federal courts, he conceived of the Court as the principal—“the hierarchical head” in the quotation above—and other federal courts as its faithful agents. “Some of the methods and devices I have discussed are obviously not open to use in the lower courts,” he observed, adding that “[s]ome are, and as to them, the system of precedent, by which the Supreme Court instructs the lower courts and employs them as its agents, will serve.”¹⁸³ Along similar lines, political scientist Henry Abraham wrote that the Court “stands at the very pinnacle of the judiciary: There is no higher court, and all others bow before it—or, at least, are expected to do so.”¹⁸⁴ Closer to the present, Professor Katie Eyer writes that, “as others have observed, the lower federal courts are, in our system, bounded by a constitutional culture

179. See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295 (2005):

In the legal academy, thinking about the judicial system is distinctly top-down. There is a hierarchy, and at the pinnacle sits the Supreme Court. The work of the Supreme Court gets the lion's share of attention, and it is simply taken for granted that lower courts do, and should, follow the mandate of higher courts.

(footnote omitted).

180. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962).

181. *Id.* at 16, 198.

182. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970).

183. BICKEL, *supra* note 180, at 198.

184. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 186 (7th ed. 1998).

that regards them primarily as the faithful agents of the Supreme Court's constitutional perspective."¹⁸⁵

Because such scholarship in law and political science models the relationship between the Court and other federal courts hierarchically, it understands the "apex" and "inferior" courts to perform different functions and to engage in characteristically different forms of reasoning. Some legal scholars who write in this vein, like Judge Richard Posner, purport to be realistically assessing the differences between the Supreme Court and other federal courts.¹⁸⁶ In Posner's view, whereas the Court is a "political body," a "lawless judicial institution" in the sense that it possesses "an ocean of discretion,"¹⁸⁷ other federal courts are bound by Supreme Court precedent and so are better able to exhibit "a certain respect for the conventional materials of decision."¹⁸⁸ Similarly, Professor Thomas Merrill writes that the Court "frequently supplements consideration of precedent with other types of authority, such as social policy, precedent from other legal systems, and occasionally even original understanding."¹⁸⁹ By contrast, Merrill views other federal courts as more restrained because they "resolve constitutional cases almost exclusively in terms of applicable Supreme Court precedent."¹⁹⁰

There is obvious value to viewing the Supreme Court and other federal courts as interacting hierarchically. Both casual empiricism and empirical studies document the general tendency of lower courts to comply with Supreme Court precedent.¹⁹¹ There is also value to viewing them as distinct institutions with different jobs to do. There are obvious differences between the roles of the Court and other federal courts, just as there are differences between the circuit courts and the district courts.¹⁹² For example, circuit courts have a responsibility to correct legal errors to a greater extent than does the Court, and the Court has a greater responsibility to ensure uniformity in the interpretation of

185. Eyer, *supra* note 53, at 217 (citing Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 465–66 (2012)).

186. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 34 (2005).

187. *Id.* at 34, 41.

188. *Id.* at 43.

189. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 286 (2005).

190. *Id.*

191. For a skeptical discussion of that literature, see Friedman, *supra* note 179, at 299–302.

192. For example, trial courts are the primary factfinders in the state and federal judicial systems.

important questions of federal law than do the circuit courts.¹⁹³ In addition, as noted above, Justices are not strictly bound by Supreme Court precedent and so have more discretion than other federal judges.¹⁹⁴ Relatedly, and as noted at the end of Part I, other federal courts may be more hesitant than the Court to act on their own in response to broad shifts in cultural values, perhaps because in the public imagination the Court is viewed more as a lawmaker and the circuit courts are viewed more as law appliers.¹⁹⁵ For that reason, engaged people care substantially more about who sits on the Court than who sits on any other court. If one models the federal judicial system hierarchically—as a pyramid with one node at the top—there are meaningful differences between the functions of that node and the functions of each of the increasing number of nodes as one proceeds downward.

And yet, just as there are limits to studying the Supreme Court mostly in isolation,¹⁹⁶ there are limits to the hierarchical model. One lesson of recent gay rights litigation in federal courts around the country (and desegregation and reapportionment litigation decades earlier) is that the Supreme Court and other federal courts may at times interact dialectically, not just hierarchically. Bickel missed that feature of their relationship, even though it was apparent at the time, when he wrote that “[t]hroughout, of course, the lower courts can act in constitutional matters as stop-gap or relatively ministerial decision-makers only.”¹⁹⁷ Bickel, it bears repeating, imagined only a “conversation” between the Supreme Court and the American people,¹⁹⁸ which caused him to overlook the “conversation” between the Court and other federal courts. The latter conversation helps constitute the federal courts as a system—a system in which lines of communication and

193. Compare, for example, the mandatory jurisdiction of the circuit courts with the certiorari jurisdiction of the Supreme Court.

194. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); see also Merrill, *supra* note 189, at 285 (“The Supreme Court follows a weak theory with regard to its own constitutional precedents, whereas the lower courts are regarded as being absolutely bound by these precedents.”).

195. See, e.g., Eyer, *supra* note 53, at 202, 217 (so arguing).

196. For example, if Bickel had focused more on the relationship between the Court and other federal courts, he might have registered the problems that the Court can create for those lower courts when it manipulates justiciability doctrines to avoid deciding the merits of a case: other federal courts may not know whether to take the Court’s potential manipulations seriously as legal doctrine. A possible example is *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), discussed *supra* note 29. For an analysis of *Hollingsworth* as a “passive virtues” decision, see Siegel, *supra* note 23, at 135–40.

197. BICKEL, *supra* note 180, at 198.

198. BICKEL, *supra* note 182, at 91.

influence can run back and forth, not just down. Again, if one models that system as consisting of both nodes and links between nodes, the nodes look different—and their functions may in certain situations appear more, rather than less, alike—when viewed in the light cast by the links.¹⁹⁹

Other scholarship in law and political science recognizes some of the limits of the top-down understanding of hierarchical approaches. Rather than focusing on the dialectic emphasized in this Article, however, such scholarship attacks the hierarchical model's assumption of lower court compliance with Supreme Court precedent. That scholarship takes more of a bottom-up approach by conceptualizing the lower federal courts as potentially faithless agents who must therefore be monitored by the Court to ensure compliance with its decisions.²⁰⁰ One group of political scientists reports that "[a] wealth of research in the last two decades has examined how the Supreme Court (as principals) can effectively oversee lower court judges (its agents)."²⁰¹ Scholars writing in this area, called "cue theory,"²⁰² have offered a variety of solutions. They include ideologically strategic auditing by the Court to manage information asymmetry,²⁰³ fire alarms by litigants in the form of amicus filings or strategic appeals to the Court,²⁰⁴ signals

199. Cf. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 236 (1968) ("But the fact is that the Supreme Court is not alone, that it shares with all common-law courts the status of existing in the tension between the principled universe of 'logic' and the expedient requirements of 'experience.'"). Deutsch was responding to Bickel's assertion that "[t]here are crucial differences—which, of course, the opinions in *Marbury v. Madison* and *Cohens v. Virginia* seek to obscure—between the role of the Supreme Court in constitutional cases and the function of courts of general jurisdiction." BICKEL, *supra* note 180, at 173.

200. See, e.g., Friedman, *supra* note 179, at 296 ("Focusing on how compliance is obtained, rather than presuming it, gives the positive literature much more of a bottom-up flavor in the sense that action at the bottom rungs of the judicial ladder can set the agenda for what happens above.").

201. Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 150 (2013).

202. The seminal work is Joseph Tanenhaus, Marvin Schick, Matthew Muraskin & Daniel Rosen, *The Supreme Court's Certiorari Decisions: Cue Theory*, in JUDICIAL DECISION MAKING 111–32 (Glendon Schubert ed., 1963).

203. See, e.g., Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 101 (2000); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 667 (2000).

204. See, e.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1110–11 (1988). But see Gregory A. Caldeira, John R. Wright & Christopher Zorn, *Organized Interests and Agenda Setting in the U.S. Supreme Court Revisited* 9 (July 17, 2012) (unpublished manuscript) (<http://ssrn.com/abstract=2109497> [<https://perma.cc/E47V-JF9L>]) ("At the same time that the number of amicus

from the Solicitor General when certain conditions are met,²⁰⁵ and whistleblowing by judges further down the hierarchy in the form of dissenting opinions,²⁰⁶ including opinions that read like petitions for a writ of certiorari.²⁰⁷ All such proposals imagine the Supreme Court as attempting to police other federal courts that might be acting strategically or pursuing their own ideological agenda rather than seeking to channel the Court's priorities.²⁰⁸ Such work suggests that lower courts can force the Court's hand,²⁰⁹ thereby impacting the content of constitutional law.²¹⁰

The bottom-up work canvassed above is more realistic than top-down approaches because it asks how hierarchy is maintained given ideological disagreements between judges on different courts. Like

filings on certiorari have grown—and perhaps owing to it—the influence of those briefs has steadily declined.”).

205. See, e.g., Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 72 (2005) (finding that the Court is more receptive to signals from the solicitor general (“SG”) when either the Court and the SG are ideologically aligned or when the SG’s signal is contrary to her ideological predisposition).

206. See, e.g., Deborah Beim, Alexander V. Hirsch & Jonathan P. Kastellec, *Whistleblowing and Compliance in the Judiciary Hierarchy*, 58 AM. J. POL. SCI. 904, 904 (2013) (presenting a model showing that whistleblowing is most informative—and therefore most effective in influencing compliance in the judicial hierarchy—when it is rare). For legal scholarship on whistleblowing, see, for example, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998).

207. See, e.g., *Fisher v. Univ. of Tex.*, 631 F.3d 213, 247 (5th Cir. 2011) (Garza, J., specially concurring) (“The Supreme Court has chosen this erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.”); *Ricci v. DeStefano*, 530 F.3d 88, 94 (2d Cir. 2008) (Cabrane, J., dissenting from denial of reh’g en banc) (“I respectfully dissent from that decision [not to rehear the case en banc], without expressing a view on the merits of the questions presented by this appeal, in the hope that the Supreme Court will resolve the issues of great significance raised by this case.”).

208. A related literature seeks to understand the factors that determine whether lower courts treat Supreme Court precedents favorably. See, e.g., Stuart Minor Benjamin & Georg Vanberg, *Judicial Retirements and the Staying Power of U.S. Supreme Court Decisions*, 13 J. EMPIRICAL LEGAL STUD. 5, 10–11 (2016) (citing prominent works in the literature to which it contributes); Stuart Minor Benjamin & Bruce A. Desmarais, *Standing the Test of Time: The Breadth of Majority Coalitions and the Fate of U.S. Supreme Court Precedents*, 4 J. LEGAL ANALYSIS 445, 446–47 (2012) (same). Rather than assuming hierarchy, this literature, too, perceives that lower federal courts have some leeway and so influence the impact of Supreme Court opinions.

209. For examples, see *Florida v. U.S. Department of Health & Human Services*, 648 F.3d 1235, 1328 (11th Cir. 2011) (guaranteeing Supreme Court review by invalidating the “individual mandate” in the Patient Protection and Affordable Care Act); *supra* note 157 (citing circuit court decisions in *Heller* and *Lopez*).

210. See, e.g., McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1634 (1995) (“Our theory suggests that the Supreme Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts.”).

Supreme Court Rule 10,²¹¹ such work does not simply assume the existence of hierarchy or attribute hierarchy entirely to norm internalization by lower court judges. Because such bottom-up scholarship posits an adversarial relationship between the Court and lower federal courts, however, it cannot account for the phenomenon of reciprocal legitimation.

Closer to the idea of reciprocal legitimation is writing on "percolation." That literature emphasizes the advantages of first allowing lower courts to decide novel legal questions for themselves, so that the Supreme Court can obtain a full airing of the issues and a diversity of opinions before it intervenes.²¹² The percolation literature also takes a bottom-up approach, but like reciprocal legitimation, it posits a non-adversarial relationship between the Court and the lower federal courts. The more cooperative nature of the relationship helps explain why the Justices themselves value percolation: as is well-known, the Court generally prefers to grant certiorari to resolve circuit splits,²¹³ and "mature" splits are typically preferred to "shallow" ones.

Yet the percolation literature, too, cannot account for either the frequency or the nature of reciprocal legitimation. Unlike percolation, which is relatively common, reciprocal legitimation is most likely to arise when the culture is deeply divided on a question of collective constitutional identity; the Court takes sides in the conflict; and in doing so it risks some portion of its public legitimacy. In such a situation, the Court may determine that its institutional interests are best served by moving slowly and deciding less than it is legally entitled to decide, and so initially not coercing other federal courts with respect to the broader question. Intended reciprocal legitimation is a technique that the Court is most likely to use when, in confronting such a situation, it anticipates that it is likely to succeed if it first attempts to

211. See SUP. CT. R. 10(a) (identifying as potentially worthy of review cases in which "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"); SUP. CT. R. 10(c) (identifying as potentially worthy of review cases in which "a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

212. For defenses of percolation, see, for example, RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985), and Lewis A. Kornhauser, *Adjudication By a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1626 (1995). For discussion of the percolation literature, see Friedman, *supra* note 179, at 305-06. Critics of percolation raise rule-of-law objections to not treating like cases alike. For a discussion, see *id.* at 306.

213. See SUP. CT. R. 10(a) (identifying as potentially worthy of review cases in which "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

persuade other federal courts to decide an issue in the Court's preferred way.

Unlike percolation, moreover, reciprocal legitimation is a process in which the Supreme Court is the initial mover and encourager, whether intentionally or not. The Supreme Court speaks in ways that potentially lend legitimacy to controversial decisions by other federal courts that expand the scope of the Court's decision, and then those other courts speak in ways that potentially lend legitimacy to a decision by the Court that validates the expansion. As exemplified by *Brown*, *Baker*, *Windsor*, and their aftermaths, reciprocal legitimation unfolds in iterative, dialectical fashion. Rather than maintaining a top-down relationship reflective of hierarchy or a bottom-up relationship indicative of conflict or percolation, the Supreme Court and other federal courts move back and forth. In proceeding side by side, moreover, they are not engaged in different enterprises; on the contrary, the enterprise itself consists of their interaction and provision of mutual support—their provision of reciprocal legitimation.²¹⁴

The conversation between the Court and other federal courts, which this Article has examined, is not independent of the conversation between the Court and the public, which Bickel emphasized. It is precisely when the public is deeply divided, and so maintaining the Court's public legitimacy is a concern, that the Court will be most likely to leverage its interaction with other federal courts in an attempt to legitimate a particular result in the "court" of public opinion. To repeat a point from the previous Section, judicial repudiations of state prohibitions on same-sex marriage in the wake of *Windsor* became normalized in light of the torrent of (widely reported) federal court invalidations, as the Court reminded readers in its opinion in *Obergefell*.

That normalization process may partially respond to skeptical questions about how much of a legitimation effect is actually produced by reciprocal legitimation. It is important to underscore, however, that this Article has not sought to establish that members of the public and

214. The tepid reactions of other federal courts to *Heller*, see *supra* Section II.B.3, and to *Lopez*, see *supra* notes 143, 156–157, and accompanying text, raise the question whether one can generalize about when those courts will expand the scope of a decision by the Court. Notably, the circuit courts in both *Heller* and *Lopez* were the first to require significant legal change, and so they may have forced the Court's hand. Other potentially relevant considerations include the pace and direction of public opinion; the stances of the political branches; the degree of ideological alignment between the Court and other federal courts; whether and how state courts are ruling; and whether a litigation campaign has organized around the issue. Interesting questions are lurking here, all of which come into view only upon recognizing that legal change in the federal judiciary is neither entirely top-down nor bottom-up, but also side-by-side.

politicians care whether other courts provide support for Supreme Court decisions, and vice versa. It probably counts for something that judges are moved to engage in reciprocal legitimation during stressful times, but reciprocal legitimation warrants investigation even if the Court is mistaken in thinking that the dialectic will enhance its public legitimacy—just as the *Brown* Court's attempts to moderate may have proven counterproductive.

C. Extensions of the Model

The model offered in this Article is amenable to several extensions. One of them, which is implicit in the reapportionment example developed in Part II.B, is to include state courts. State courts may at times perform the same function vis-à-vis the U.S. Supreme Court as do federal courts. As noted in the Introduction and Part I, the majority opinion in *Obergefell* contains an Appendix B listing state legislation and judicial decisions legalizing same-sex marriage.²¹⁵ The Court invoked that appendix once in its opinion, noting the connection between the state interventions it referenced in the appendix and the decision of the Supreme Judicial Court of Massachusetts in the *Goodridge* case.²¹⁶ The Court did not mention the likely connection between the state statutes and judicial decisions listed in the appendix and the Court's own intervention in *Lawrence v. Texas*,²¹⁷ which occurred the same year as *Goodridge*. So *Obergefell* itself appears to be an instance in which reciprocal legitimation involved state courts in addition to federal courts. The primary difference, as noted at the end of the Introduction, is when one dates the beginning of the interaction.²¹⁸

A second extension would focus on interactions among courts entirely within a state judicial system. Today, state courts seem more

215. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015). In addition, the final section of Appendix A listed the decisions of state high courts that addressed same-sex marriage. See *id.* at 2610.

216. *Id.* at 2597 ("In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. . . . After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*." (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003))).

217. 539 U.S. 558 (2003); see *supra* note 63 (noting that the *Lawrence* Court deemed the expression of moral opposition to homosexuality an illegitimate state interest).

218. There is a robust literature on state constitutionalism and its relationship to constitutional norm generation, including at the federal level. For the seminal contribution, see Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

likely to be threatened with defiance by state officials than are federal courts. An example is the recent separation of powers dispute in Kansas over public school funding. “As advocates of increased school funding brought their request to the Kansas Supreme Court,” the *New York Times* reported in 2013, “the staunchly conservative Legislature vowed to defy any court orders that it felt trampled on its sovereignty.”²¹⁹ The court and the legislature subsequently proceeded to lock horns, with the court repeatedly instructing the legislature “to finance public schools equitably, especially poorer districts with less property wealth,”²²⁰ or face a shutdown of public schools in the state.²²¹ For their part, “many lawmakers who think the court was overreaching its authority were calling for the Legislature to defy the court.”²²² Governor Sam Brownback—under pressure for cuts to state programs that many attribute to the tax cuts he championed in 2012 and 2013—called the legislature into special session to avoid a showdown with the court that could close the schools.²²³ The drama continued until the legislature passed a new funding bill during the special session, the governor signed it, and the state supreme court quickly issued a decision before the deadline accepting the new funding plan and avoiding a shutdown of the schools.²²⁴ Meanwhile, the Republican Party campaigned—ultimately unsuccessfully²²⁵—to oust four members of the court in the upcoming retention election.²²⁶

Because state judges are more likely than federal judges to be threatened with disobedience (and to have to stand for re-election), state judges may more frequently have reason to take steps to protect their public legitimacy. If that is right, then the phenomenon of reciprocal legitimation may be more likely to arise in state judicial

219. John Eligon, *Kansas Legislature Threatens Showdown with Court over School Financing*, N.Y. TIMES (Oct. 8, 2013), http://www.nytimes.com/2013/10/09/us/kansas-legislature-threatens-showdown-with-court-over-school-financing.html?_r=0 [https://perma.cc/7MJ6-DLZ8].

220. Julie Bosman, *Kansas Parents Worry Schools Are Slipping Amid Budget Battles*, N.Y. TIMES (May 31, 2016), <http://www.nytimes.com/2016/06/01/us/kansas-parents-worry-schools-are-slipping-amid-budget-battles.html> [https://perma.cc/X62Q-FBHM].

221. *Id.*

222. Joe Robertson et al., *Gov. Sam Brownback Calls Kansas Lawmakers into Special Session on Schools*, KAN. CITY STAR (June 7, 2016, 11:20 AM), <http://www.kansascity.com/news/politics-government/article82238222.html> [https://perma.cc/VX22-2LMK].

223. Bosman, *supra* note 220; Robertson et al., *supra* note 222.

224. See *Kansas Supreme Court Elections, 2016*, BALLOTPEDIA: THE ENCYCLOPEDIA OF AMERICAN POLITICS, https://ballotpedia.org/Kansas_Supreme_Court_elections_2016 (last visited Feb. 22, 2017) [https://perma.cc/3FSF-FEX2].

225. See *id.*

226. See Sam Zeff, *Get Ready for a Raucous Kansas Supreme Court Retention Race*, KCUR.ORG (May 24, 2016), <http://kcur.org/post/get-ready-raucous-kansas-supreme-court-retention-race#stream/0> [https://perma.cc/S4H6-8E9P].

systems than in the federal system. Whether that hypothesis is correct—whether state high courts and other state courts rely upon one another for mutual support in politically stressful times—warrants scholarly investigation. If that hypothesis is incorrect, then it is worth examining whether and why state courts seek to safeguard their public legitimacy in other ways,²²⁷ including by avoiding the sort of controversy that might tempt judges to pursue reciprocal legitimation in the first place.

A third extension would move beyond judges and examine the extent to which the Court may pursue reciprocal legitimation with powerful non-judicial actors, such as presidents, Congresses, agencies, state governments, interest groups, repeat litigants, and social movements. As Professor Keith Whittington and others have shown, political leaders, especially presidents, have generally had institutional reasons to support the Court's assertions of interpretive authority.²²⁸ And the Court has at times invoked congressional deliberations and federal statutes or regulations as partial authority for its own decisions.²²⁹ There seems no inherent reason why reciprocal legitimation would be limited to interactions among judges, given that political actors may also perceive the need to look outside themselves in order to legitimate their publicly controversial decisions.

Finally, the relationship between reciprocal legitimation and democratic experimentation warrants examination. It is possible that reciprocal legitimation can sometimes blend into societal experimentation and learning. For example, suppose that instead of deciding *Obergefell* two years after *Windsor*, the Supreme Court had decided it five years later. In the interim, a large number of same-sex marriages would have taken place, and Americans who were either opposed to or uncertain about same-sex marriage would have seen that the sky did not fall. They may have already seen that the sky did not

227. See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that state law's limitation of marriage to opposite-sex couples violates the state constitution, but permitting the legislature to choose between allowing same-sex couples to marry and allowing them to form civil unions with every benefit of marriage).

228. See generally WHITTINGTON, *supra* note 165.

229. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (“Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.”).

fall in the years before *Obergefell*, but with more time additional evidence would have accumulated.²³⁰

IV. RECIPROCAL LEGITIMATION AND JUDICIAL CANDOR

Because reciprocal legitimation has not previously been identified, the primary purposes of this Article are descriptive and analytical, not normative. So far, accordingly, the Article has sought to name and understand reciprocal legitimation, to document several instances of the phenomenon or its absence, to connect it to more familiar judicial behaviors, and to explore its implications for scholarship in constitutional law, federal courts, and judicial politics. Before evaluating a judicial practice, it seems more important first to understand the practice, including from the perspective of the judges who engage in it.

Yet reciprocal legitimation—especially, but not only, its intentional variant—does potentially raise normative concerns. That is because the Justices who participate in the process tend to compromise judicial candor in the service of protecting the Court’s public legitimacy. This Part defends a rebuttable presumption in favor of judicial candor, identifies stronger and weaker justifications for judicial opinions that lack full candor, and applies its analysis to *Windsor* and *Obergefell*.

A. A Definition and Defense of a Presumption Favoring Candor

In an influential essay defending a strong presumption in favor of judicial candor, Professor David Shapiro explained that a statement lacks candor when the person making it believes it to be false, and the person makes the statement either with the intent to mislead a target audience, or with indifference to whether the statement will deceive that audience.²³¹ Shapiro’s conceptualization extends to omissions. An omission lacks candor when the failure to disclose is designed to mislead the target audience in some material way about what has been said, or when the speaker is indifferent to the fact that the omission will render what she has said materially deceptive.²³² One could puzzle over the requisite mens rea (for example, intent, knowledge, or recklessness)

230. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

231. See Shapiro, *supra* note 16, at 732.

232. *Id.* at 732–33.

of a speaker for her statement or omission to qualify as lacking candor. But what matters most for present purposes is that the presence or absence of candor depends upon the mental state of the speaker.²³³

Both intended and unintended reciprocal legitimization raise potential concerns about an absence of candor, because both may involve the same lack of forthrightness at the end of the process about the Court's own causal influence earlier in the process. For example, it seems less than entirely candid for the Court in *Obergefell* to have repeatedly characterized its own intervention in favor of marriage equality only as an effect of developments in the lower federal courts and elsewhere, and not also as a cause of those developments.

Although both variants of reciprocal legitimization potentially raise normative concerns, the potential concerns with intended reciprocal legitimization are greater. That is because it implicates additional questions about a lack of full candor at the start of the process. For example, it was potentially misleading for the Court in *Windsor* to have spoken out of both sides of its mouth, including by introducing a novel "federalism" analysis that seemed more instrumentally useful in temporarily limiting the scope of the holding than it was logically necessary, persuasive on its own terms, or likely to decide any future cases.²³⁴ It seems likely that some opponents of same-sex marriage who invoked the federalism reasoning in *Windsor* for their own purposes felt manipulated or misled upon learning the holding in *Obergefell*.²³⁵

Perhaps the Court was not misleading sophisticated consumers of its opinions, who might be thought to know better. Yet as noted in

233. See *id.* at 732 ("[T]he declarant's state of mind is crucial.").

234. One might object that the federalism analysis in *Windsor* illuminated the equal protection question by showing that the federal law's uniqueness impugned Congress's motives in enacting it. See, e.g., Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012–2013 CATO SUP. CT. REV 117, 119 (concluding that federalism "played a critical role" in the Court's opinion). Straightforward equal protection reasoning would have sufficed, however, and defining marriage for all federal purposes as *including* same-sex marriages would be just as unusual as excluding them but would not be suspicious. Moreover, it is difficult to identify another actual or hypothetical federal law that would be unconstitutional on similar federalism grounds. For a discussion, see generally Siegel, *supra* note 23. As discussed *infra* Section IV.B, however, the Court was being candid if it believed what it wrote about the federalism problems with the statute and was not using federalism reasoning for other purposes.

235. See, e.g., Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013), <http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/> [<https://perma.cc/G9GA-E7ZM>];

[T]he principles in *Windsor* of respect for state sovereignty and the authority of the people of the states to define marriage support the conclusion that the Court will affirm the constitutionality of those states that have reaffirmed the historic understanding of marriage—the union of one man and one woman.

Part I, a number of federal judges, including some eminent ones, read *Windsor* as a federalism opinion, even after Justice Scalia repeatedly called out the Court in *Windsor* for the federalism language in the majority opinion.²³⁶ Moreover, no dissenter in *Obergefell* criticized the Court for the conduct identified in this Article, even as each dissenter otherwise seemed eager to undermine the Court's legitimacy.²³⁷

Whatever its impact on close observers of its work, the Court may be misleading less sophisticated readers of its opinions—or Americans who hear about the Court's decisions from less sophisticated readers in the news media. They may not realize the extent of the Court's own role in creating, perhaps intentionally, a bandwagon effect in the federal courts—not in the states—throughout the nation. Nor may they realize that they are not being told the whole truth when the Court in *Obergefell* invokes the results of a process in support of its decision with no recognition that it had played a part in producing the process.²³⁸ That group may include first-year law students, whose edited casebook versions of *Obergefell* likely omit Appendix A and at least some of the Court's several references to it.

Transparency, and therefore candor, is a core value of the rule of law, and frequently detected absences of candor can strain the subtle relationships of trust that sustain the rule of law.²³⁹ Expressively, moreover, an absence of candor suggests that a particular audience is not entitled to the truth or cannot be trusted with the truth, and so is

236. See *United States v. Windsor*, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting) ("My guess is that the majority . . . needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term).") (footnote omitted); *id.* at 2710:

[T]hat Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place.

(citation to majority opinion omitted); *id.* ("The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there.").

237. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting) ("I write separately to call attention to this Court's threat to American democracy."); *id.* at 2630 n.22:

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

238. See Jack M. Balkin, *The Supreme Court Simulates a State Bandwagon Effect in Favor of Same-Sex Marriage*, BALKINIZATION (Oct. 7, 2014), <http://balkin.blogspot.com/2014/10/the-supreme-court-simulates-state.html> [https://perma.cc/N4JU-NFDH].

239. For a discussion of rule-of-law values and the political foundations of the rule of law, see Siegel, *supra* note 87, at 965–69.

undeserving of equal respect.²⁴⁰ It demeans the dignity of people to mislead them, at least without substantial justification for doing so.²⁴¹ To fully grasp this point, one need only recall instances in which one has received important communications that in material ways lacked candor, only to later learn the full truth of the matter.

In addition, obligations of reason giving are typically (although not invariably) imposed on judges. They are imposed in important part to discipline the exercise of judicial power—to subject judicial decisions to critical scrutiny. Absent an obligation of candor, however, that method of discipline is greatly diminished. As Professor David Shapiro observes, “[J]udges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail.”²⁴²

All that said, the complexity of the normative question eludes a simple admonition that the Court should be forthright in every respect in every case. One need not agree with Professor Martin Shapiro that “[c]ourts and judges always lie,” or that “[l]ying is the nature of the judicial activity,”²⁴³ to register that judicial opinion writing (and joining) is a genre of communication engaged in by individuals who are performing a particular institutional role with its own sometimes subtle rules and expectations. For example, the Court does not generally regard itself as permitted to acknowledge that it makes law even though many observers understand that it has little choice but to make law in significant respects.²⁴⁴ Accordingly, it can be difficult to determine what kinds of forthrightness about which issues are required in a judicial opinion.

In addition, it has long been recognized that the *Brown* Court’s narrow focus on education, as opposed to the relationship between segregation and equality more generally, was not a model of candor, nor

240. Cf. Shapiro, *supra* note 16, at 736–37 (“[L]ack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker.”).

241. See Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 598 (2010):

[I]nstrumental considerations aside, there are dignitary harms associated with misleading the public about the nature and function of judicial review. It is wrong to deceive people—and thereby to diminish their apprehension of the governmental institutions under which they live—in the absence of very good reason for doing so.

242. Shapiro, *supra* note 16, at 737.

243. Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL’Y 155, 156 (1994). It is not obvious how to reconcile such statements with Shapiro’s earlier criticisms of *Brown* and *Baker* for lacking candor. See *supra* note 123 and accompanying text.

244. For discussions, see generally, for example, Post & Siegel, *supra* note 83; Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007).

were the subsequent unreasoned *per curiams*.²⁴⁵ That concern, however, may have been the least of the Court's problems. *Brown* exemplifies the truth that complete candor is not always the best policy in law or life.²⁴⁶ A scholar who saw this before others is Professor Jan Deutsch, who passed away while this Article was being written. Deutsch intervened in the late 1960s in response to the criticisms of the Court's segregation and reapportionment decisions by both Professor Herbert Wechsler (wielding his "neutral principles") and Professor Martin Shapiro (wielding his "political jurisprudence").²⁴⁷ Deutsch brilliantly observed that "the Court, as an institution, has certain institutional needs—for example, the needs to ensure survival and operate efficiently," and "those needs are necessarily reflected in the form and content of its work."²⁴⁸ Those needs, he added, preclude fully candid judicial opinions.²⁴⁹

The Court sometimes finds itself operating in a fallen world—that is, a world in which important constitutional rights have yet to be protected due to public and professional opposition.²⁵⁰ In such a world, the Court may have its work cut out for itself as it seeks to secure the public legitimacy of divisive decisions that vindicate basic constitutional values. If, as Professor Akhil Amar has suggested, "the judicial province and duty is not merely to say what the law is, but also to make the law real,"²⁵¹ then *Brown's* professed narrowness is potentially supported by sufficient justification. Demanding full candor is sometimes asking too much of government officials, including Justices, who may be trying in good faith to execute their responsibilities in circumstances in which others are undermining their ability to do so for reasons that are themselves difficult to defend.

In less extreme circumstances, a Court whose view of the law warrants a relatively maximalist response to a legal question may

245. See *supra* Section II.B.1 (discussing the conduct of the *Brown* Court).

246. See, e.g., Deutsch, *supra* note 199, at 240 ("No marriage is perfect, and precious few are great, but the fact that any marriage would disintegrate under the stress of an insistent demand for complete candor is nevertheless sufficient to convince us that intellectual honesty is inadequate as the sole criterion for selection of a marital partner.").

247. See *supra* notes 94, 123, and accompanying text (citing the work of Wechsler and Shapiro).

248. Deutsch, *supra* note 199, at 213.

249. See *id.* at 249 ("Shapiro's condemnation of the reapportionment and segregation decisions, like the insistence on candor that results in the coalescence of his assessments of the Court's work with those of [Wechsler and Hand], thus arises from his disregard of the institutional needs of the Court.").

250. See generally JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

251. AMAR, *supra* note 107, at 215.

nonetheless write a relatively minimalist opinion for a variety of potentially worthwhile reasons that it is not prepared to announce publicly, because doing so would be self-undermining or would appear political. For example the Court may be seeking to maintain collegiality within the Court, which may be essential to its efficient functioning well beyond the case under review.²⁵² Or the Court may be trying to maintain some measure of solidarity in American society, which may be threatened to a greater extent by more decisive judicial interventions.²⁵³ Or the Court may be trying to put stakeholders on notice that a substantial change in the law is coming, thereby reducing reliance interests in a gradual way. Such rationales for relative minimalism, even if they are not publicly articulated, seem distinguishable from situations in which the Court is simply trying to insulate itself from professional criticism by presenting itself as more restrained than it is or intends to be.

It is challenging to reconcile all of the competing considerations canvassed above. Without delving deeper into a difficult topic, however, it seems reasonable to conclude—and in any event the following analysis will assume—that the Court is generally obliged to be candid regarding the reasons for its interventions and decisions, but that this obligation is defeasible in the face of adequate justification. At one end of the spectrum of justifications, *Brown*-like reasons—that is, making the law real for people on the ground, and sustaining the Court's public legitimacy in the face of real threats of defiance or recriminations—seem like adequate justifications for judicial opinions that are not fully candid. At the other end of the spectrum, an attempt by the Court to insulate itself from accountability for its decisions—from professional and public criticism—is inadequate justification for abandoning judicial candor. In between those extremes, concerns sounding in collegiality, solidarity, or reliance potentially justify opinions that lack full candor, but whether such concerns can carry the day depends on the circumstances—on the extent to which such concerns are pressing and the extent of the sacrifice of candor.

252. See *supra* Section II.B.2 (noting the *Baker* majority's loyalty to Justice Stewart even when it no longer needed his vote); cf., e.g., Deutsch, *supra* note 199, at 213 (emphasizing the Court's need to operate efficiently).

253. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 50 (1999) (explaining that narrow, shallow Supreme Court opinions "are efforts to achieve both social stability and a degree of reciprocity, together with mutual respect, under conditions that threaten to endanger these important values").

B. Windsor and Obergefell

With that admittedly rough conceptualization of the problem in mind, this Part turns back to *Windsor* and *Obergefell*. Any attempt to evaluate the Court's candor in those cases must confront a serious problem, which the previous Section anticipated. Candor turns on subjective intent, and one cannot be certain what the Court was intending. The Justices in the majority have not told us, and no "smoking gun" evidence is available to date.

If the Court was not trying to mislead anyone with its federalism analysis in *Windsor* and with its invocations of other federal court decisions in *Obergefell*, then the opinions suffered from no lack of candor.²⁵⁴ But even if the Court was being somewhat disingenuous in those opinions for the reasons articulated above, it does not appear that it was being entirely disingenuous. *Windsor* can be understood as a quasi-Bickelian intervention: the Court made a move in what appears to have been an interaction with other federal courts and then waited to see whether and how those courts would take it up on its offer.²⁵⁵ The Court's intervention appeared genuinely Bickelian, not simply disingenuous, for at least two reasons.

First, other federal courts were not required as a matter of vertical stare decisis to respond as the Court wanted them to respond. As noted in Part I, the Court gave more socially conservative or cautious courts the resources with which to reject the Court's offer. As also documented in Part I, moreover, some of those courts (and individual judges on other courts) did reject the offer.²⁵⁶ And the Court took the

254. Perhaps Justice Kennedy, the author of the majority opinion in *Windsor*, is differently situated from the other members of the majority. The question for them is whether collegiality concerns justified their signing onto federalism reasoning they found unpersuasive (assuming they did). According to David Shapiro, "[T]he sticking point can and should be an unwillingness to make or join in a statement that does not represent the judge's views and that will mislead the opinion's readers as to what those views are." Shapiro, *supra* note 16, at 743. That standard, however, may ask too much of a nine-judge court that issues more than seventy opinions a year. It also seems unlikely that most readers will be misled given the understanding that Justices often join opinions containing reasoning to which they do not subscribe.

255. Cf. BICKEL, *supra* note 182, at 91 ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives."). *Windsor* is best thought of as a continuation of a preexisting conversation that began with *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). See *supra* notes 20–22 and accompanying text; *supra* Section III.C. Moreover, as explored in Section III.B, the conversation was not just between the Court and the public, but also between the Court and other federal courts.

256. As Richard Re has observed, Justice Scalia encouraged federal and state courts to distinguish *Windsor*. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1909 (2014) (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting)).

risk (even if a relatively modest one) that it would have to decide whether to rule in favor of marriage equality in the teeth of numerous federal court decisions reading *Windsor* as assigning to the states the authority to decide the issue of same-sex marriage. The genuine ability of other courts not to move in the direction to which the Court was pointing lends some legitimacy to the Court's reliance on the rulings of those courts that did follow along. To borrow concepts from other areas of law, the consent given by the circuit courts seemed voluntary and informed; they were not acting under duress.

On the other hand, Professors David Klein and Neal Devins offer empirical evidence that federal and state courts almost always follow a statement in an opinion of a higher court even though it is dictum and so outside the boundaries of formal precedent.²⁵⁷ Matters may look different from the account offered immediately above if federal courts in same-sex marriage cases conceived of their role as predicting what the Supreme Court would do or want²⁵⁸ or were simply concerned about being reversed when future intervention by the Court was virtually assured.²⁵⁹ Matters may look different because of the relatively strong signal that the Court sent in *Windsor*.

Even so, there remains a difference between a nudge from the Court, which preserves circuit court decisionmaking autonomy, and a shove from the Court, which does not. As noted in Part I.B, the Court in *Windsor* offered a nudge. It also seems likely that circuit judges care less about 7-2, 6-3, or 5-4 reversals, which are more likely to be interpreted as reflecting legitimate disagreement, than about 8-1 or 9-0 reversals, which are more likely to sting and cause embarrassment.²⁶⁰ It was obvious after *Windsor* that there were not more than five votes

257. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2036–42 (2013).

258. See generally Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994) (advocating a prediction-based jurisprudence for use by judges). But see Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 715 (1995) (arguing that, as a general matter, a prediction-based approach to judging undermines the rule of law).

259. Some commentators argue that judges are motivated by reversal avoidance. See, e.g., Caminker, *supra* note 258, at 77 ("Much anecdotal evidence suggests that lower court judges dislike being reversed on appeal."). Others disagree, particularly regarding federal circuit judges, in part because of the general unlikelihood of Supreme Court review. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 118–19 (1995) ("[A]version to reversal . . . is . . . fairly unimportant in the case of court of appeals judges because reversals . . . have become rare and most reflect differences in judicial philosophy or legal policy rather than mistake or incompetence by the appellate judges."); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1273 (2005).

260. Thanks to Dean David Levi for sharing this insight. Judge Richard Posner makes a similar point in the works cited *supra* note 259.

on the Supreme Court for invalidating any state prohibition on same-sex marriage. Judges are also less likely to care about reversal when they care deeply about the issue. For many judges, the constitutional status of same-sex marriage is probably such an issue.

Second, the Court did not appear to be engaged in a complete charade, even if its federalism analysis in *Windsor* left something to be desired from the internal point of view.²⁶¹ Rather, the Court seemed interested in the ideas that had bubbled up from the courts of appeals. For example, commentators have debated why Justice Kennedy primarily wrote a substantive due process opinion (that is, one based upon the right to marry)²⁶² and not one or another classification-based equal protection opinion (that is, one finding unjustified discrimination on the basis of sexual orientation or sex). In search of answers, commentators have emphasized such explanations as Justice Kennedy's libertarianism, his desire to avoid deciding certain discrimination claims, and the virulence of conservative reactions to the Court's charges of animus in *Windsor*.²⁶³ Commentators have not, however, considered what the Court may have learned from other federal courts.

There was a basic difference between the majority opinions that four circuit courts issued in favor of marriage equality. The opinions of the Fourth and Tenth Circuits, which rested on the right to marry, were more respectful of opponents of same-sex marriage, and they were less incendiary and broad than the opinions of the Seventh and Ninth Circuits, which found unconstitutional discrimination on the basis of sexual orientation.²⁶⁴ Even though the Court in *Windsor* mostly wrote

261. See *supra* note 234 and accompanying text (identifying problems with the Court's federalism reasoning in *Windsor*).

262. There is equality reasoning and an equal protection holding at the end of the majority opinion, but even there the Court emphasizes discrimination in providing access to a fundamental right, not classification-based equal protection. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

263. For various hypotheses, see, for example, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 2015 SUPPLEMENT 133 (6th ed. 2015).

264. Compare *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014) ("*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships."), and *Bishop v. Smith*, 760 F.3d 1070, 1096–97 (10th Cir. 2014) (Holmes, J., concurring) ("I write here . . . to focus on one significant thing that the district court wisely did *not* do in rendering its substantive ruling on the same-sex marriage ban. Specifically, the district court declined to rely upon animus doctrine in striking down SQ 711."), with *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014) ("The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously."), and *Latta v. Otter*, 771 F.3d 456, 473 (9th Cir. 2014) ("*Windsor* makes clear that the defendants' explicit desire to express a

an equality-based, animus opinion,²⁶⁵ the Court in *Obergefell* mostly shifted from equality to liberty and followed the approach adopted by the Fourth and Tenth Circuits. Emphasizing that there is an identity between opposite-sex couples and same-sex couples regarding every reason why the right to marry is protected today, the Court avoided holding or implying that proponents of traditional marriage in state after state had an invidious purpose or that sexual orientation discrimination triggers heightened scrutiny in every context.²⁶⁶

Accordingly, if the federal courts were not moving entirely independently of the Supreme Court, neither were they responding entirely dependently. Because other federal courts were allowed to weigh in—and because the Court seemed to care about how they weighed in—before the Court decided the issue for itself, the Court's approach seems relatively conversational and participatory. Even as the Court was nudging, it was also learning and adapting. Indeed, it is not clear that the Court had decided in *Windsor* to invalidate all state prohibitions on same-sex marriage. For example, if most other federal courts had reacted differently to *Windsor*, or if the backlash to invalidations had been substantially greater, the Court may have been open to means of postponement. (That does not mean, however, that the Court was using other federal courts merely as bellwethers for public opinion, not as potential sources of support. If the Court had been using those courts only as bellwethers, it probably would not have spent so much time talking about them in *Obergefell*.)

To be sure, a more cynical interpretation of *Windsor* and *Obergefell* is possible. On that view, the Court's conduct in both cases was a manipulative ruse, similar to the protestations in *Bush v. Gore*²⁶⁷

preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination. Expressing such a preference is precisely what they *may not do*.”).

265. See *supra* notes 23–28 and accompanying text (discussing the majority opinion in *Windsor*).

266. At this point, whether the right to marry articulated in *Obergefell* includes three-person or incestuous marriages is mostly the stuff of law school hypotheticals, unlike whether states may discriminate against gay people in employment, housing, education, adoption, and family formation. Practically, therefore, the Court's liberty holding is narrower than an equality holding likely would have been.

267. Compare *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam) (“When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”), *with id.* at 126–27 (Stevens, J., dissenting) (“Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.”).

and *Citizens United v. FEC*²⁶⁸ that the Court simply *had* to end the controversy—there was no choice—when the Court itself was arguably responsible for creating the perceived conditions of compulsion. It seems improbable, however, that the Court would have ruled in favor of marriage equality when it did, and on the grounds that it did, regardless of how other federal courts responded to *Windsor*. Although the Court may not have been entirely candid in *Windsor* and *Obergefell*, it also seems overstated to conclude that other federal courts were only its props, and not also its partners, along the path to *Obergefell*.

Not only is it unlikely that the Court was simply being disingenuous in *Windsor* and *Obergefell*, but it also seems defensible to conclude that the Court had reason to fear at least some acts of defiance up and down the hierarchies of certain state governments and, more importantly, to fear recriminations directed at members of the LGBT community. Exemplifying concerns about compliance were the actions of Chief Justice Roy Moore in Alabama²⁶⁹ and County Clerk Kim Davis in Kentucky.²⁷⁰ Exemplifying concerns about recriminations are the actions by certain states to prohibit measures protecting LGBT persons from discrimination and to require transgender individuals to use public bathrooms corresponding to their biological sex, not their gender identity.²⁷¹ *Windsor* was clearly not *Brown* in this regard, but neither

268. Compare *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (“[T]he lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*.”), with *id.* at 398 (Stevens, J., dissenting) (“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.”).

269. See, e.g., Alan Blinder, *Top Alabama Judge Orders Halt to Same-Sex Marriage Licenses*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/07/us/top-alabama-judge-orders-halt-to-same-sex-marriage-licenses.html?ref=topics> [https://perma.cc/L7W9-W9BT] (“The chief justice of the Alabama Supreme Court, Roy S. Moore, on Wednesday effectively ordered probate judges in the state not to issue marriage licenses to same-sex couples, a move that could cloud the carrying out of the United States Supreme Court decision that legalized same-sex unions.”); see also *V.L. v. E.L.*, 136 S. Ct. 1017, 1019 (2016) (per curiam) (holding unanimously that the Alabama Supreme Court erred in refusing to grant full faith and credit to a judgment by a Georgia court making a woman the legal parent of the children she had raised with her same-sex partner since birth, because the judgment appears on its face to have been issued by a court with jurisdiction and there is no established Georgia law to the contrary).

270. See, e.g., Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released from Kentucky Jail, Won't Say if She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html> [https://perma.cc/7J8F-MEPJ]:

After five nights in jail for refusing to issue marriage licenses to same-sex couples, Kim Davis, a Kentucky county clerk, walked free Tuesday to a roar of cheers from thousands of supporters, but she and her lawyer would not say whether she would continue to defy court orders and try to block the licenses.

271. See, e.g., Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. TIMES (Mar. 23, 2016), http://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html?_r=0 [https://perma.cc/4E4F-BW9W]:

does it seem appropriate to conclude that the Court in *Windsor* and *Obergefell* may have compromised the obligation of judicial candor merely in order to insulate itself from public criticism.

CONCLUSION

From the perspective of the relationship between the Supreme Court and other federal courts, what may be most interesting about *United States v. Windsor* and *Obergefell v. Hodges* is what the casebooks have taken out of the majority opinion in *Obergefell*. They have removed its appendix, along with the opinion's several references to it. In all likelihood, the Court's own conduct in *Windsor* was also a cause, and not just an effect, of the federal court decisions referenced in Appendix A. The Court's conduct in *Windsor* may also have been an intended cause.

The interaction between the Court and other federal courts beginning in *Windsor* and ending in *Obergefell* is reminiscent of the judicial conduct in racial segregation and reapportionment cases decades earlier. The judicial interaction in recent marriage equality cases exemplifies the potential power of judges to help produce constitutional change. It also illuminates a nonobvious aspect of the relationship between the Court and other courts in the system that they collectively constitute.

For those who seek to understand how the American constitutional system operates, reciprocal legitimation—different courts invoking one another as authority in iterative fashion—warrants examination even without an assertion or proof of initial subjective intent. But it is worth considering whether instances of reciprocal legitimation were initially intended, as perilous as that inquiry can be, because an affirmative answer raises the question of why the Court decided to proceed in that fashion. An affirmative answer may also affect a normative evaluation of the Court's conduct—specifically, the extent to which judicial candor may permissibly be sacrificed in order to vindicate other values. Indeed, intended reciprocal legitimation may be the most interesting and controversial variant of the phenomenon

The state bill, put together so quickly that many lawmakers had not seen it before it was introduced Wednesday morning, specifically bars people in North Carolina from using bathrooms that do not match their birth gender, and goes further to prohibit municipalities from creating their own antidiscrimination policies. Instead, it creates a statewide antidiscrimination policy—one that does not mention gay and transgender people.

because it is indicative of a Court that can and does help shape the very gestalt or public opinion to which it is often thought to respond.

The Court “labors under the obligation to succeed” not only in moving the American public,²⁷² but also in nudging federal judges. There is always a risk that the Court will fail. But if the Court does succeed, it will have earned the opportunity to invoke other federal court rulings as authority for its own decisive decision in virtue of the fact that it had previously permitted those courts to decide for themselves.²⁷³

CODA:

PRESIDENT TRUMP’S POTENTIAL THREAT TO JUDICIAL INDEPENDENCE

This Article is making its way through the publication process during a time in which the President of the United States, Donald J. Trump, is disparaging the federal courts and particular federal judges in ways that are unprecedented in modern times.²⁷⁴ The President has given specific indications that, in the event of a terrorist attack, he will blame the federal courts as well as the news media, which he implausibly alleges is under-reporting such attacks.²⁷⁵ For example, the

272. BICKEL, *supra* note 180, at 239 (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.”).

273. Reciprocal legitimation may help explain why judicial decisions invalidating bans on same-sex marriage did not trigger the degree of backlash that theorists of the phenomenon had earlier predicted. See, e.g., Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 459–72 (2005). Klarman later qualified his claims. See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013). So did William Eskridge. See William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 295–96 (2013).

274. See, e.g., Peter Baker, *Trump Clashes Early with Courts, Portending Years of Legal Battles*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html> [<https://perma.cc/SV5X-KQNL>] (quoting the opinion of Jack Goldsmith, head of the Justice Department’s Office of Legal Counsel under President George W. Bush, that “Trump’s serial attacks on judges and the judiciary take us into new territory”); Julie Hirschfeld Davis, *Supreme Court Nominee Calls Trump’s Attacks on Judiciary ‘Demoralizing,’* N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html> [<https://perma.cc/6JQF-7TVT>] (quoting the opinion of former George W. Bush judicial appointee Michael McConnell that “Mr. Trump is shredding longstanding norms of etiquette and interbranch comity”).

275. See, e.g., Scott Shane, *Is News of Terror Attacks Underplayed? Experts Say No*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/terrorist-attack-media-coverage-trump.html> [<https://perma.cc/5GT8-TW4T>] (“‘Pre-emptive blame,’ said [Martha] Crenshaw, the Stanford terrorism researcher. ‘Nothing’s happened. But if something does happen, he can blame the judiciary and the news media.’”); see also Max Fisher & Kitty Bennett, *Our Articles on the Attacks Trump Says the Media Didn’t Cover*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/the-white-house-list-of-terror-attacks->

President publicly asserted that because of a “ridiculous” federal district court decision by a “so-called judge” stopping enforcement of his initial executive order on immigration and refugees, “many very bad and dangerous people may be pouring into our country,” and that the decision “opens up our country to potential terrorists and others that do not have our best interests at heart.”²⁷⁶ He also contended that if the federal government does not prevail in the litigation involving the legality of the order, “we can never have the security and safety to which we are entitled.”²⁷⁷ He then deemed “disgraceful” the appellate hearing (initiated by his administration) before a panel of three judges of the Ninth Circuit.²⁷⁸ He condemned the panel even though it was composed of Republican and Democratic appointees alike who, in asking difficult questions of both sides, were each models of professionalism and competence.²⁷⁹ The panel was subsequently unanimous in rejecting the administration’s position in the appeal.²⁸⁰

The President’s public antagonism and ad hominem attacks are causing many commentators to opine that the President is preemptively engaging in blame shifting in the event of a terrorist attack.²⁸¹ More disturbingly, a few commentators have expressed the concern that the President may be trying to establish a narrative that

underreported-by-media.html?mtrref=www.google.com [https://perma.cc/57A6-EW3G] (stating that President Trump claims the media is not sufficiently reporting terrorist attacks, and providing links to media sources that reported on the White House’s list of terrorist attacks from September 2014 to December 2016).

276. The President’s tweets that are quoted in the text are collected and analyzed by Jack Goldsmith, *Does Donald Trump Want to Lose the EO Battle in Court? Or Is Donald McGahn Simply Ineffectual (or Worse)?*, LAWFARE (Feb. 6, 2017, 8:22 AM), <https://lawfareblog.com/does-trump-want-lose-EO-battle-court-or-donald-mcGahn-simply-ineffectual-or-worse> [https://perma.cc/4FLE-DAZK].

277. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2017, 4:03 AM), <https://twitter.com/realdonaldtrump/status/829299566344359936?lang=en> [https://perma.cc/5F2N-XZ7Q].

278. See, e.g., Davis, *supra* note 274 (quoting Trump’s characterization of the hearing before the Ninth Circuit panel as “disgraceful”).

279. Audio of the oral argument before the Ninth Circuit panel, which took place on February 7, 2017, is available online. Oral Argument, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 7, 2017), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010884 [https://perma.cc/Q7H9-WA34].

280. *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 9, 2017) (per curiam) (order denying emergency motion for stay pending appeal), <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf> [https://perma.cc/6A3A-EQWK].

281. See, e.g., Philip Rucker, *If Something Happens: Trump Points His Finger in Case of a Terrorist Attack*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/politics/if-something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882_story.html?utm_term=.aecde82fa795 [https://perma.cc/TH3Q-QYGP] (“President Trump appears to be laying the groundwork to preemptively shift blame for any future terrorist attack on U.S. soil from his administration to the federal judiciary, as well as to the media.”); Shane, *supra* note 275 (same).

he can use after an attack in order to rally a fearful public into accepting his disregard of judicial authority.²⁸² Although the courts are currently asserting their authority, they will inevitably become more politically vulnerable after an attack, especially a significant one.²⁸³

If the political environment for judicial independence becomes more treacherous, it is reasonable to predict (although by no means certain) that the process of reciprocal legitimation, or something like it, will unfold. Proceeding incrementally and finding strength in numbers is one potentially effective way for judges to rebut the President's repeated charges to his millions of Twitter followers that federal courts are illegitimate because the judicial decisions going against him are political. The situation may be somewhat reminiscent of the Court's public projection of unanimity in *Brown*.²⁸⁴ President Trump's accusations and conduct, as well as the disaggregated nature of the litigation in response to his executive orders (that is, different suits filed in different courts), may cause federal judges to find greater strength in numbers than they would otherwise be likely to achieve.²⁸⁵

If that happens, there will be a certain irony in it: by unjustifiably deriding the federal courts as political, the President will have succeeded in encouraging them to act politically, at least to some extent, in order to safeguard their own public legitimacy. But if events unfold in that fashion, the federal courts will be acting politically in arguably the most defensible sense of the word—in the sense of statesmanship, not partisanship.²⁸⁶ And the potential defensibility of judicial statesmanship in response to unjustified attacks on the public legitimacy of courts illuminates why it is overstated to condemn

282. Curtis Bradley & Neil S. Siegel, *Judicial and Media Independence After the Next Attack*, LAWFARE (Feb. 9, 2017, 5:41 PM), <https://www.lawfareblog.com/judicial-and-media-independence-after-next-attack> [<https://perma.cc/4F9B-AALM>]; Paul Krugman, *When the Fire Comes*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/opinion/when-the-fire-comes.html> [<https://perma.cc/29R7-NPRY>].

283. See Bradley & Siegel, *supra* note 282 (making this point).

284. See *supra* text accompanying note 93 (observing that the *Brown* Court was in fact divided). Ideologically diverse Justices may at times stick together to protect judicial power when it is under threat. In addition to *Brown*, see, for example, *United States v. Nixon*, 418 U.S. 683 (1974), and *Cooper v. Aaron*, 358 U.S. 1 (1958).

285. Cf., e.g., Baker, *supra* note 274 (quoting the opinion of Jack Goldsmith that “[t]he sloppiness and aggressiveness of the directives, combined with the attacks on judges, put extra pressure on judges to rule against Trump”).

286. See generally Siegel, *supra* note 87 (offering a theoretical account of the phenomenon of judicial statesmanship, which counsels judges to take some account of the conditions of their own public legitimacy).

reciprocal legitimation in all circumstances for compromising judicial candor.²⁸⁷

287. Cf. Eric Posner, *Judges v. Trump: Be Careful What You Wish For*, N.Y. TIMES (Feb. 15, 2017), https://www.nytimes.com/2017/02/15/opinion/judges-v-trump-be-careful-what-you-wish-for.html?_r=1 [<https://perma.cc/9CYQ-V72B>] (“The courts were playing politics, but of a valid constitutional kind.”).

APPENDIX

Voting Behavior of Circuit Court Judges in Recent Same-Sex Marriage Cases

(Votes against a purely partisan prediction are noted in bold.)

CASE	CIRCUIT	RULING	MAJORITY	DISSENT
<i>United States v. Windsor</i> (2012)	Second	Invalidated federal law's refusal to recognize same-sex marriage	Jacobs (George H. W. Bush) , Droney (Obama)	Straub (Clinton)
<i>Bostic v. Schaefer</i> (2014)	Fourth	Invalidated Virginia's ban on same-sex marriage	Floyd (Obama), Gregory (Clinton recess appointee, then nom. by George W. Bush)	Niemeyer (George H.W. Bush)
<i>DeBoer v. Snyder</i> (2014)	Sixth	Upheld several states' restrictions on same-sex marriage	Sutton (George W. Bush), Cook (George W. Bush)	Daughtrey (Clinton)
<i>Baskin v. Bogan</i> (2014)	Seventh	Invalidated Indiana's and Wisconsin's bans on same-sex marriage	Posner (Reagan) , Hamilton (Obama), Williams (Clinton)	
<i>Hollingsworth v. Perry</i> (2012)	Ninth	Invalidated California's Proposition 8	Reinhardt (Carter), Hawkins (Clinton)	Smith (George W. Bush)
<i>Latta v. Otter</i> (2014)	Ninth	Invalidated Idaho's and Nevada's bans on same-sex marriage	Reinhardt (Carter), Gould (Clinton), Berzon (Clinton)	
<i>SmithKline Beecham Corp. v. Abbott Labs.</i> (2014)	Ninth	Subjected sexual-orientation classifications to heightened scrutiny	Reinhardt (Carter), Berzon (Clinton), Schroeder (Carter)	
<i>Bishop v. Smith</i> (2014)	Tenth	Invalidated Oklahoma's ban on same-sex marriage	Lucero (Clinton), Holmes (George W. Bush)	Kelly (George H.W. Bush)
<i>Kitchen v. Herbert</i> (2014)	Tenth	Invalidated Utah's ban on same-sex marriage	Lucero (Clinton), Holmes (George W. Bush)	Kelly (George H.W. Bush)
