RESPONSE

Institutional Effects on Reciprocal Legitimation in the Federal Courts

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INTRODUCTION

Two years ago, the Supreme Court held 5-4 in its highly publicized and controversial decision of *Obergefell v. Hodges*[1] that state bans on same-sex marriage violated the U.S. Constitution. In the course of the majority opinion, Justice Anthony Kennedy seemed to go out of his way to highlight the large number of lower court decisions, most very recent, that had considered constitutional challenges to these same-sex marriage bans. Thus, the Court said, there was now "a substantial body of law considering all sides of the issues," which "helps to explain and formulate the underlying principles this Court now must consider."[2] Most of these decisions, the Court observed, concluded that the bans were unconstitutional, and the Court stated that they were all collected with citations in a lengthy Appendix A.[3]

In his recent article, Neil Siegel sees a greater jurisprudential significance in this unusual reference by the Court to lower court

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1. 135 S. Ct. 2584 (2015).
2. *Id.* at 2597.
3. *Id.* at 2597, 2608–10.

adjudication.[4] He points out that much law and political science scholarship posits the relationship between the Supreme Court and the lower (especially though not only) federal courts as either a "top-down" or "bottom-up" model. The former model assumes a principal-agent relationship between the Court and lower courts, with the Court supervising the decisions of lower courts that are supposed to faithfully implement its decisions. In contrast, the latter model assumes that due to relatively few decisions on appeal being rendered by the Supreme Court, lower courts are more apt to be relatively free agents and thus not necessarily faithful to the Court's doctrine. Somewhat more positively under the latter model, lower courts, and particularly different Circuits, can also be conceived as laboratories of experimentation, with issues helpfully percolating and potentially aiding the Court before it eventually resolves the issue.[5]

Professor Siegel sees a third model, "reciprocal legitimation," as best explaining Appendix A in *Obergefell* and arguably similar Court decisions. In this model, the Court and lower courts proceed in a dialectical and iterative manner. As he explains, the Court may render an initial decision, expecting it to be applied and expanded by lower courts, and later rely on those lower decisions for authority in a subsequent decision confirming the result. The Court thus can protect its public legitimacy by explicitly invoking the authority of lower courts in validating the breadth of a later decision.[6] This "side-by-side" model is distinct from the top-down and bottom-up models, and from the concept of percolation.[7]

As Professor Siegel sees it, reciprocal legitimation better describes the litigation that culminated in *Obergefell* and its Appendix A. *Obergefell* was also controversially preceded by *United States v. Windsor*.[8] *Windsor* 5-4 struck down portions of the federal Defense of Marriage Act, which stated that same-sex marriages would not be recognized for federal legal purposes, as violative of the U.S. Constitution. *Windsor* inevitably and quickly led to a flood of litigation in the lower federal courts challenging state same-sex marriage bans, which culminated in *Obergefell*.[9] Professor Siegel also sees reciprocal legitimation at play in two older, but equally high-profile, iconic

4. Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183 (2017).

5. *Id.* at 1186–87 (discussing both models).

6. *Id.* 1202.

7. *Id.* at 1188, 1226–27.

8. 133 S. Ct. 2675 (2013).

9. Siegel, *supra* note 4, at 1190–97 (discussing *Windsor* and *Obergefell*).

Supreme Court decisions. One is *Brown v. Board of Education*,[10] which struck down state sanctioned racial segregation of schools. *Brown* was followed by an inevitable application by lower courts striking down racial restrictions in public transportation and other settings, and the Court affirmed appeals of those decisions in a series of short, unexplained *per curiam* decisions.[11] In a somewhat similar fashion, Professor Siegel references the Supreme Court's reapportionment decisions in the 1960s. The initial decision was *Baker v. Carr*,[12] which (distinguishing earlier cases) famously held that challenges in federal court to malapportioned state legislative districts were not nonjusticiable political questions. *Baker* led to a flood of lower court litigation challenging such districts in many states, often successfully, as violative of one-person, one-vote principles. That lower court litigation culminated not long thereafter in the Court's decision in *Reynolds v. Sims*,[13] which affirmed that trend and struck down malapportioned state legislative districts from Alabama. *Reynolds* was promptly applied in companion and subsequent lower court decisions to the legislative districts of all fifty states.[14]

Professor Siegel's thoughtful and informed reformulation of the relationship between the Supreme Court and the lower (particularly federal) courts presents a valuable opportunity to rethink the models that have characterized most scholarly discourse on that relationship. This remains true even if the new model is restricted to the high-profile decisions he discusses. As he tells us, he is mostly concerned with a positive description of how the Court interacts with lower courts, and less concerned with the normative issues of whether the Court should pursue that model or whether the phenomenon of reciprocal legitimation is intentional or unintentional on the Court's part.[15] No doubt those aspects will be the subjects of future scholarship.[16] What

10. 347 U.S. 483 (1954).

11. Siegel, *supra* note 4, at 1203–06 (discussing *Brown* and its aftermath).

12. 369 U.S. 186 (1962).

13. 377 U.S. 533 (1964).

14. Siegel, *supra* note 4, at 1206–1211 (discussing *Baker*, *Reynolds*, and related litigation). Professor Siegel also discusses decisions where, as he sees it, reciprocal legitimation did not take place. *Id.* at 1211–14 (discussing District of Columbia v. Heller, 561 U.S. 742 (2010) and its aftermath). Those cases are beyond the scope of this essay.

15. *Id.* at 1188.

16. Professor Siegel already discusses some normative implications and related issues in his article. *Id.* at 1231–42 (discussing judicial candor). Future scholarship might confront what precisely counts as reciprocal legitimation. Much litigation that culminates in Supreme Court decisions might be regarded as iterative in nature, with one decision often setting an agenda for and encouraging other litigants to pursue litigation to expand or contract the first case. *See* VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA (2007); Douglas Rice, *The Impact of Supreme Court Activity on the*

are also worth further exploration are institutional aspects of the federal court system that might facilitate or limit reciprocal legitimation.[17] Examining some of those institutional characteristics—the Supreme Court's shrunken docket, the presence of discretionary and mandatory appeals, and three judge district courts and direct appeals—will help us appreciate the strengths and limits of Professor Siegel's model.

I. THE SUPREME COURT'S SHRUNKEN DOCKET

One institutional factor is the diminution of the number of merits decisions by the Supreme Court over the time period Professor Siegel discusses. For most of the twentieth century, the Court was rendering well over one hundred decisions on the merits in any given Term. As late as the 1980s, the Court was deciding 125 or more cases per Term. The numbers began a gradual decline in the 1990s, and for the past couple decades the Court has typically been deciding about seventy-five cases per Term.[18] The number of petitions for review has not changed, so scholars have attributed the decline to various other internal and external factors, including the almost complete elimination of the Court's mandatory appellate jurisdiction by Congressional statutory changes (particularly in 1988), ideological change on the Court itself, the apparent desire of some Justices to agree to review fewer cases, and greater ideological homogeneity between a majority of the Justices and those on the lower courts.[19]

How might this diminished docket affect the reciprocal legitimation model? It seems obvious that with fewer decisions, there are fewer opportunities for the Court to monitor the decisions of the lower federal courts and the state courts. The principal, it would seem, will have fewer chances to monitor and if necessary correct the actions of the agents.[20] More than that, over twenty years ago Arthur Hellman

Judicial Agenda, 48 LAW & SOC'Y REV. 63 (2014). Thus, a broad view of the model might suggest that many or even most of the Court's merits decisions are examples of reciprocal legitimation. Professor Siegel seems to have a less robust version of the model in mind, limited to when the Court renders decisions on especially high-profile, controversial issues.

17. Siegel, *supra* note 4, at 1222–23 & n.193 (briefly mentioning certiorari and direct appeals as methods for the Supreme Court to hear cases).

18. For documentation of the decline, see LEE EPSTEIN, ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 88–90 (5th ed. 2012); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228–29 (2012).

19. For discussion and evaluation of these and other factors, see Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 405–32; Owens & Simon, *supra* note 18, at 1234–45.

20. Owens & Simon, *supra* note 18, at 1251–52.

suggested that a diminished docket may reflect an "Olympian Court" detached from the "day-to-day operation" of the lower courts.[21] "Lower-court judges," he continued, "will no longer feel the spirit of goodwill and cooperation that comes from participation in a shared enterprise."[22] If that is the case, the lack of a shared enterprise further suggests that the lower courts would overall be themselves aloof from the Court, and on the whole uninterested in engaging in the "side-by-side" adjudication contemplated by reciprocal legitimation.

To be sure, the effect of the shrunken docket can be exaggerated. After all, the vast majority of review petitions were denied even in the heyday of the swollen docket of the Court. The available evidence shows that most lower courts will follow Supreme Court doctrine, as they perceive it, even when the chances of review and possible reversal of any given decision is small.[23] That said, at least in recent years, the Supreme Court does not regularly reference, or explicitly draw upon, lower court decisions in making its own decisions. It might refer in passing to a circuit split that occasioned the grant of certiorari (and not always then), but it does not regularly rely upon lower court decisions for authority.[24] This suggests that *Obergefell* is almost a one-off, perhaps an unusually high-profile case where the Court, concerned with its legitimacy, went out of its way to reference lower-court decisions, especially those that anticipated the result. Recall that Professor Siegel also referred to *Brown* and the reapportionment decisions, rendered when the Court had a much larger docket. Both those cases were also extremely high-profile like *Obergefell*, so perhaps reciprocal legitimation has been and is destined to be confined to such cases.[25]

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21. Hellman, *supra* note 19, at 435–36.

22. *Id.* at 436–37.

23. Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 20 (2013); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1476–80 (2005); Siegel, *supra* note 4, at 1238 & n.259.

24. Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 915 (2014) (study of Court's decisions in 2010–2012 terms examining express invocations of lower court opinions in circuit-split cases showed that "lower courts have at best modest influence on the Supreme Court."); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012) (study of Fourth Amendment decisions demonstrating that the Court often did not mention a circuit split, or rely on the lower court decisions in developing doctrine). *But cf.* Pamela C. Corley, et al., *Lower Court Influence on U.S. Supreme Court Content*, 73 J. POL. 31 (2011) (study using plagiarism software showing that Court opinions often draw on language from the lower courts).

25. Professor Siegel draws on various factors in concluding that *Obergefell* and other decisions are examples of reciprocal legitimation. The presence of Appendix A in *Obergefell* was only one factor, and he did not claim that analogs to Appendix A would appear in other cases. That said, it is interesting to observe that there's not much evidence of similarities to an Appendix A in other cases. For example, in Brown v. Bd. of Educ., 347 U.S. 483 (1954), the Court only referred

On the other hand, perhaps the Court's smaller docket, which shows no signs of abating,[26] might lead to *more* reciprocal legitimation. The smaller number of cases reviewed, oftentimes combined with political gridlock in Washington, D.C., rightly or wrongly amplifies the perceived influence and importance of any given decision. As I further discuss in the next section, the smaller docket highlights how the Court controls what appears on its merits docket. The Court, in turn, may find it appropriate to take steps to lend greater legitimacy to these cases,[27] and engaging in reciprocal legitimation might be a way to accomplish that. That is, with smaller dockets of cases perceived to be more important, there is arguably increased pressure on the Court to earn credibility for any given decision. Under these assumptions, *Obergefell* is not so unusual after all, and we might expect more overt examples of reciprocal legitimation (whether accompanied by Appendices A or not) in the future.[28]

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to the four lower court decisions consolidated on appeal in a footnote, albeit a lengthy one. *Id.* at 486 n.1. The Court decided six reapportionment cases on the same day in 1964, the best known of which are Reynolds v. Sims, 377 U.S. 533 (1964) and Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964). The majority opinions in those two cases have little to say by way of citation to lower court decisions after *Baker v. Carr*. In contrast, the dissent in *Reynolds* discussed the lower court decisions under review in all six cases. 377 U.S. at 615–20 (Harlan, J., dissenting). Similarly, a dissent in *Lucas* observed that many post-*Baker* lower court decisions, which it cites, had come to a different conclusion than the majority (on whether both houses of a bicameral state legislature had to comply with one-person, one-vote principles). 377 U.S. at 746 n.9 (Stewart, J., dissenting). He added that many post-*Baker* scholars disagreed with the majority's conclusion. *Id.*

26. *The 2015 Term, Statistics*, 130 HARV. L. REV. 507 (2016) (Court rendered seventy-five merits decisions in 2015 term).

27. Owens & Simon, *supra* note 18, at 1260–62*; cf.* Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMM. 221 (2016) (discussing how the size of the Court's docket should impact the breadth or narrowness of its decisions).

28. In this essay, I'm focusing primarily on structural aspects of the federal court hierarchy. One factor outside of that structure is the number of amicus curiae briefs filed in Supreme Court cases. The number of such briefs filed in individual cases and for the merits (and indeed certiorari) docket as a whole has dramatically increased in recent terms, as has the Court's citation to and apparent reliance on such briefs. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016). Professor Siegel mentions such briefs, Siegel, *supra* note 4, at 1224, and their increased presence and apparent influence might also be attributable to the shrunken docket and be indicia of the presence of reciprocal legitimation. Michael E. Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 156–57 (2016) (also observing that there may be "synergistic effects between the Court seemingly relying on and citing amicus briefs more often, and interest groups filing those briefs.") (footnote omitted). In addition to referring to the lower court cases, the majority in *Obergefell* made reference to, and cited, the numerous amicus briefs filed in the case. 135 S. Ct. at 2605. One of the dissents was less impressed by the many amicus briefs filed. *Id.* at 2624 (Roberts, C.J., dissenting) (pointing out that the majority referred to the "more than 100" amicus briefs filed, and sarcastically responded, "What would be the point of allowing the democratic process to go on?. . ..The answer [to how to define marriage] is surely there in one of those *amicus* briefs or studies.").

II. DISCRETIONARY AND MANDATORY APPEALS

The Supreme Court's docket is not only shrunken, but the size is almost completely under the control of the Court itself via the certiorari process. Professor Siegel's model seems to suggest an implicit agreement or understanding among *all* judges and Justices in the judicial hierarchy that some side-by-side reciprocation is taking place. Naturally, we are not talking about all judges in the United States. We can relax the assumption by referring primarily to the Article III federal judiciary, and for the most part to the appellate judiciary at that. But the assumption is further relaxed if the process for cases appearing on the Court's merits docket is almost exclusively within the Court's control. The reciprocal legitimation model, at least in part, seems to assume that many federal judges are engaging in a joint enterprise of law-making. So they are, but it belies the first-among-equals status of the Supreme Court due to docket control.

The Court's near total control of its docket is a relatively recent development. The Judges' Bill of 1925 culminated a series of statutory reforms early in the twentieth century that placed most of the Court's merits docket under discretionary certiorari jurisdiction. But certain categories of cases remained or were placed on the Court's alternative appellate jurisdiction, which at least nominally required the Court to hear those cases and decide them on the merits. The latter cases included appeals from federal or state courts dealing with the constitutionality of federal or state statutes. A series of further statutory reforms culminating in 1988 sharply reduced appellate jurisdiction. Today, the small sliver of cases that reach the Court on appellate jurisdiction are those dealing with reapportionment from three-judge district courts, and from a small number of federal statutes that provide for direct appeal.[29] Many scholars largely (though not completely) attribute the shrunken docket to the effect of the 1988 amendment and its predecessors.[30]

These statutory changes vest greater discretion in the Court in controlling its own docket than ever before. Thus, the concept of reciprocal legitimation still has purchase, but it seems one largely controlled by the Supreme Court itself. Consider *Obergefell* as an

29. For overviews of these reforms, see RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 30, 463 (7th ed. 2015); STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 75–77 (10th ed. 2013).

30. *Compare* Hellman, *supra* note 19, at 408–12 (arguing that the significant curtailment of appellate jurisdiction in 1988 played only a minor role in causing the shrunken docket), *with* Owens & Simon, *supra* note 18, at 1278–79 (giving more significant weight to the effect of the 1988 amendments), *and* Kenneth W. Moffett, et al., *Strategic Behavior and Variation in the Supreme Court's Caseload Over Time*, 37 JUST. SYS. J. 20, 33 (2016) (same).

example. Many lower federal courts after *Windsor* in June of 2013 and before *Obergefell* almost exactly two years later, weighed in on the constitutionality of state same-sex marriage bans, and they were mentioned by the majority and cited in Appendix A. As Professor Siegel acknowledges,[31] these cases came up on certiorari petitions more-or-less in chronological order, but they were not disposed of in random fashion. Rather, in October of 2014, the Court denied certiorari in cases involving five states from three circuits, all of which had invalidated the bans.[32] Those denials were issued without recorded dissent, but a month later in an order denying a stay, involving a separate state law, Justice Thomas, joined by Justice Scalia, dissented on the basis that the Court frequently grants certiorari to review lower court decisions that invalidate state laws, even in the absence of a split of authority.[33] Referring to the denials in October in the same-sex marriage cases, Justice Thomas added that "for reasons that escape me, we have not done so with any consistency, especially in recent months."[34] Some further lower courts seemed to interpret these orders as invitations to not only invalidate the bans but to refuse to impose any stays, pending appeals.[35]

Not long after Justice Thomas' complaint, the Court granted certiorari in January of 2015 to a circuit decision that (in a consolidated case) had upheld the same-sex marriage bans of four states.[36] It did not escape notice that the Court, in denying the earlier petitions, had permitted lower courts to in effect invalidate the bans in over thirty states, months before the *Obergefell* decision on the merits. This arguably made it difficult for the Court to turn back the clock by upholding all of the bans later in 2015. Or to put the point more positively, it made it easier to strike down all of the bans when it did.[37] Yet the Court could have easily removed that difficulty, it seems, by simply holding all of those certiorari petitions in abeyance until it either denied all of them at once or until it granted at least one, as it eventually did. It's hard to escape the conclusion that "the Supreme Court maintained total control over how the litigation would proceed

31. Siegel, *supra* note 4, at 1193.

32. For citations to and for an excellent overview and analysis of the activity by the Court described in this paragraph, see Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L. Q. 243, 306–07 (2016).

33. Maricopa Cty., Arizona v. Lopez-Valenzuela, 135 S. Ct. 428, 428 (2014) (Thomas, J., dissenting from denial of a stay).

34. *Id.*

35. Blackman & Wasserman, *supra* note 32, at 309–11.

36. Obergefell v. Hodges, 135 S. Ct. 1039–40 (2015) (granting certiorari in four cases).

37. Blackman & Wasserman, *supra* note 32, at 318, 322–23; William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, 2014–2015 CATO SUP. CT. REV. 111, 134–36.

throughout the lower courts."[38] This is not a ringing endorsement of a robust conception of the reciprocal legitimation model, with its vision of side-by-side decision-making.

III. THREE-JUDGE DISTRICT COURTS AND DIRECT APPEALS

Another institutional feature of the federal courts hierarchy that can potentially impact the reciprocal legitimation model has been the three-judge district court, and its provision for non-certiorari, direct appeals to the Supreme Court. These courts had their statutory genesis in 1910, when Congress reacted to the now canonical decision of *Ex parte Young*.[39] That case held that challenges to the constitutionality of state legislation could be brought in federal court against state officials, in effect creating an exception to the Eleventh Amendment, which, as the Supreme Court had interpreted it, would have forbidden such suits directly against states. The decision was highly controversial, as it struck down a piece of Progressive Era legislation and apparently made it easier for federal court plaintiffs to do the same in other litigation. Congress considered various responses but settled on statutorily requiring that a three-judge district court be convened when plaintiffs sought *Ex parte Young*-type relief. Unlike the usual process involving suits brought before a single district judge with normal appellate review thereafter, the change required that a circuit judge, a district judge, and a third judge selected by the Chief Judge of the Circuit (usually another district judge) hear the case, and their decision could be the subject of a direct appeal to the Supreme Court. The rationale for the new procedure was that challenges to state legislation were particularly delicate in a federal system, that three judges rather than just one could better decide such cases and the decision would be given more legitimacy, and that the Supreme Court ought to quickly rule on such cases, given their importance.[40]

Would, or did, three-judge district court litigation impact the reciprocal legitimation model? The evidence is ambiguous. On one hand, the sitting of three judges rather than one might embolden them (somewhat contrary to original reasons for the establishment of the courts) to take more innovative decisions, as compared to those of one judge, and not simply routinely apply Court precedent as faithful

38. Blackman & Wasserman, *supra* note 32, at 322.

39. 209 U.S. 123 (1908).

40. This paragraph draws on the overview of the history of the three-judge district court found in Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 124–25 (2014).

agents.[41] Also, the direct appeals of such decisions have to be ostensibly decided on the merits by the Supreme Court, a sharp difference from the certiorari process.[42] Indeed, lower court judges have suggested that such direct appeals can "force the hand" of the Court.[43] More recently, Chief Justice John Roberts remarked that such appeals in effect force the Court to hear the case and limit the sort of lower-court percolation often favored by the Court via the certiorari process.[44] In this view, direct appeals virtually require the Court to hear and decide the case, limiting the ability of the Court to marshal lower court decisions in favor of a particular result or to not decide a case for other reasons.

On the other hand, the ambit of the three-judge district court has been considerably restricted by Congress. By the 1960s and 1970s, the Supreme Court and other policymakers were lobbying to repeal or modify the 1910 statute on the basis that frequently assembling three-judge district courts was inundating the Court with direct appeals, and was unnecessarily cumbersome and inefficient given that the cases could be appropriately decided before single district judges with the usual review thereafter. In reaction, Congress in 1976 severely downsized the jurisdiction of the court by eliminating it except to hear reapportionment and a very few other cases. This led to a plunge in

41. For one prominent example, see the litigation culminating in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding state could not force students to salute the flag or recite the Pledge of Allegiance), overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). *Barnette* was an appeal from a three-judge district court, and that court held for the plaintiff by arguing that the Court would overrule *Gobitis*, as indeed it did. *See* 47 F. Supp. 251, 253 (S.D. W. Va. 1942) (three-judge court), aff'd, 319 U.S. 624 (1943). Not long thereafter, during the Civil Rights Era of the 1950s and 1960s, many litigants perceived a trial court of three federal judges, with a direct appeal if necessary to a relatively friendly Supreme Court, to be a better venue than one possibly hostile federal district judge with normal appellate review thereafter. *See* Michael E. Solimine, *Congress,* Ex parte Young, *and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 125–32 (2008). Another case that resembles the *Barnette* litigation, albeit with a different result, is Younger v. Harris, 401 U.S. 37 (1971). There, the lower court held that Whitney v. California, 274 U.S. 357 (1927) (upholding California's anti-syndicalism statute) had been effectively overruled by later First Amendment cases, and indeed cited the lower court decision in *Barnette* in support of its authority to so hold. Harris v. Younger, 281 F. Supp. 507, 516 & n.2 (C.D. Cal. 1968) (three-judge court). Despite the fact that the Supreme Court indeed so held in the separate, later case of Brandenburg v. Ohio, 395 U.S. 444 (1969), the Court in *Younger* on direct appeal reversed the lower court on abstention grounds.

42. SHAPIRO ET AL., *supra* note 29, at 303–04.

43. Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J. L. REF. 79, 105 (1996)*; cf.* Siegel, *supra* note 4, at 1225 (arguing that "lower courts can force the Court's hand" in certiorari context) (footnote omitted).

44. Kimberly Strawbridge Robinson & Nicholas Datlowe, *The Cases the Supreme Court Really Doesn't Want to Hear?*, 85 U.S.L.W. 303 (2016) (discussing oral argument in Shapiro v. McManus, 136 S. Ct. 450 (2015))*; see also* Nicholas O. Stephanopoulos, *The Regulation of Polarization*, 83 U. CHI. L. REV. ONLINE 160, 165 (2017) (similarly arguing that "doctrinal confusion" has attended development of reapportionment law in lower courts regarding Section two of the Voting Rights Act given direct appeals and lack of intermediate appellate review).

direct appeals to the Court.[45] Moreover, the Court from an early stage often treated such direct appeals as almost the functional equivalent of certiorari decisions. The Court did this by dealing summarily with such appeals, with limited briefing and oral argument, often affirming in brief *per curiam* decisions. The decision was technically on the merits, but with no accompanying explanatory opinion, it was of limited precedential value in the Court itself and in lower courts as compared to other decisions from the certiorari docket.[46] The relative paucity of direct appeals, combined with the practice of summary dispositions, suggests only a limited effect on the existence of reciprocal legitimation.

Professor Siegel discusses several prominent decisions that arrived at the Court via such direct appeals. He mentions *Brown v. Board of Education* as an example of his model. It's worth noting that this case came up on direct appeal from a three-judge district court, and several of the subsequent *per curiam* affirmances by the Court, applying *Brown* outside the public education field, were from three-judge district courts.[47] Similarly, Professor Siegel cites *Baker v. Carr* and the subsequent reapportionment decisions as another example. That decision too was an appeal from a three-judge district court.[48] Professor Siegel points out that subsequent three-judge court litigation rapidly challenged the drawing of legislative districts in other states, culminating in the six cases decided together in 1964. That rapid and widespread litigation on a single topic was no doubt facilitated by the direct appeals available in such cases.[49]

The ambiguous and uncertain effect of three-judge district courts and direct appeals is illustrated by a prominent decision Professor Siegel doesn't mention, *Roe v. Wade*.[50] That decision was a direct appeal from a three-judge district decision that had struck down Texas' law restricting abortion.[51] The conventional story of *Roe* doesn't seem to provide much support for the reciprocal legitimation model. It's often said that the majority in *Roe* overreached by striking down the Texas law on relatively broad grounds before wider support for such a

45. For an overview of the 1976 amendment and its impact, see Solimine, *supra* note 41, at 134–48.

46. SHAPIRO ET AL., *supra* note 29, at 300–12.

47. Siegel, *supra* note 4, at 1205 & n.101–05; *see also* Solimine, *supra* note 41, at 126–28 (discussing three-judge district court aspects of *Brown*).

48. 179 F. Supp. 824 (M.D. Tenn. 1959) (per curiam) (three-judge court), *rev'd*, 369 U.S. 186 (1962).

49. Michael E. Solimine, *the Solicitor General, and the Path of Reapportionment Litigation*, 62 CASE W. RES. L. REV. 1109, 1136 (2012).

50. 410 U.S. 113 (1973).

51. 314 F. Supp. 1217 (N.D. Tex. 1970) (three-judge court) (per curiam), *aff'd*, 410 U.S. 113 (1973).

holding was apparent and in the process stifled the then nascent efforts in state legislatures to modify or repeal anti-abortion laws. This, in turn, is said to have energized the pro-life movement and led to increased polarization on an issue that persists to the present day.[52] Among the infirmities of *Roe*, some allege that it lacked the sort of factual record, or the benefit of lower court percolation, that justified the broad brush treatment it gave to all abortion laws.[53] Some of these criticisms might be traced to the case arriving at the Court via a direct appeal, which the Court may have felt it had to decide then and there.

Yet other aspects of the litigation culminating in *Roe* have indicia of reciprocal legitimation. Consider that the Court ordered a second round of oral argument in the case, delaying its resolution,[54] and that by the decision in 1973 there were no less than thirteen lower federal court decisions from other states, all from three-judge district courts. There were also fifteen state court decisions by then, all of which considered the constitutionality of abortion restrictions in other states. A majority of the decisions struck down the laws on various grounds.[55] Indeed, the direct appeals of several of these decisions had already been docketed when the Court initially set the direct appeal of *Roe* for argument.[56] The majority opinion in *Roe* cites most of these decisions, mentions that a majority had struck down the law in question, and purports to draw on them for its reasoning.[57] Some chroniclers of *Roe* have suggested that the majority was particularly influenced by one of those decisions, which had struck down Connecticut's law.[58] After *Roe* was decided, the Court remanded the cases (some of which had been pending for one or two years) already docketed on direct appeal for further consideration in light of *Roe*,[59] not unlike what the Court did in the wake of *Brown* and the reapportionment cases. From this

52. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (citing inter alia Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985)). For a challenge to the conventional wisdom, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (arguing that divisive abortion controversy was in place before *Roe*).

53. CLARKE D. FORSYTH, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* (2013); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

54. David J. Garrow, *How* Roe v. Wade *Was Written*, 71 WASH. & LEE L. REV. 893, 906 (2014).

55. Jonathan P. Kastellec, *Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial Review Before* Roe v. Wade, 4 J. L. & CTS. 1, 19–20, 32–33 (2016).

56. Garrow, *supra* note 54, at 902–03.

57. *Roe*, 411 U.S. at 148 n.42, 154–55, 158.

58. *See* Garrow, *supra* note 54, at 908–09, 921 (discussing how Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972) (three-judge court) influenced the majority opinion)*; see also Roe*, 411 U.S. at 154, 158 (citing *Abele*).

59. DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 607–08 (1994).

perspective, *Roe* can be seen as an effort to utilize reciprocal legitimation. Pushing against this perspective is the fact that *Roe* hardly settled the legal response to abortion.[60] Since 1973, the Court has faced a steady stream of judicial challenges to federal and state statutes that seek to restrict abortion.[61]

Consider too how the litigation culminating in *Obergefell* might have differed had the three-judge district court with direct appeals been in place for the constitutional challenges.[62] If that regime was in place, presumably the Court would have been confronted with possibly numerous direct appeals a year or more before *Obergefell* was handed down. The Court may have felt the need to decide one of those cases early on, rather than denying stays and certiorari as it actually did. In that environment, it seems unlikely that a large body of lower court decisions would have amassed at a relatively leisurely pace, as actually happened.[63] Presumably, many of the decisions cited in Appendix A would not have existed to be cited had the Court intervened on the merits in one case earlier. Or, the Court could have delayed ruling on the certiorari petitions in 2014. Either way, this would have put a dent in *Obergefell* being a model of reciprocal legitimation.

CONCLUSION

The model of reciprocal legitimation introduced by Professor Siegel promises to provide a richer and more nuanced account of the interaction between the Supreme Court and the lower courts, both federal and state. As he details, other models in the legal and political science scholarly literature are alternatively focused on the Supreme

60. This is not to say that the Court, or anyone else, always anticipates or immediately designates a decision as high-profile or controversial. Consider *Roe* itself, which did not lack for publicity or controversy when it was issued. *Id.* at 600–12. While Justice Harry Blackmun, the author of the majority opinion, felt it "was not such a revolutionary opinion at the time." Garrow, *supra* note 54, at 893. Thus, the Court may, consciously or unconsciously, engage in reciprocal legitimation whether the decision is high-profile or not. That said, Professor Siegel's focus is on high-profile decisions and so is mine.

61. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 13–28 (10th ed. 2014) (summarizing post-*Roe* abortion cases decided by the Supreme Court).

62. The thought experiment is inspired by Matthew J. Franck, *The Problem of Judicial Supremacy*, NAT'L AFFAIRS, Spring 2016, at 137, 147–49.

63. *Cf. id.* at 148 (arguing that the mandatory appeal process for lower court challenges to state statutes ought to be reinstated, and further commenting on the denials of certiorari that preceded *Obergefell*: When [the Court granted certiorari and decided the case], Justice Kennedy had the temerity to suggest that the lower court rulings he had done much to encourage—and which he and his colleagues would not lift a finger to review or stay—constituted a trend.…[The certiorari process has] contributed to an inflation of the Court's importance and of the justices' self-importance. And the wholly discretionary control of the Court's docket by its justices has enabled them to impose their will on the country with minimum effort, relying on lower courts to do much of their dirty work.).

Court dictating what the lower courts should do or emphasize a Court often heavily influenced by, or even detached from, much lower-court decision-making. His model combines features of both, when the Court in an iterative manner anticipates and jurisprudentially relies upon lower court decisions. He persuasively argues that certain aspects of high-profile litigation in the Court, and their aftermath in the lower courts and later in the Court itself, are best accounted for by his model, as opposed to the traditional top-down or bottom-up models.

In this Response, I have attempted to add another element to the discussion and analysis of the reciprocal legitimation model. In my view, institutional aspects of the hierarchical court system, with the Supreme Court at the apex, are an important element in the operation of the model, and indeed whether and to what extent it operates in litigation. The Court's current shrunken docket, the Court's own discretionary control over virtually all of its docket, and the now diminished effect of direct appeals from lower courts all affect the model, demonstrating both its explanatory strengths and limits. Overall, these institutional factors suggest, in my view, that the Court plays a central controlling function even in the new model.