


2016

# The High Power of the Lower Courts

Doni Gewirtzman

*New York Law School*, [doni.gewirtzman@nyls.edu](mailto:doni.gewirtzman@nyls.edu)

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_other\\_pubs](https://digitalcommons.nyls.edu/fac_other_pubs)

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Fourteenth Amendment Commons](#), [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

---

## Recommended Citation

Gewirtzman, Doni, "The High Power of the Lower Courts" (2016). *Other Publications*. 177.  
[https://digitalcommons.nyls.edu/fac\\_other\\_pubs/177](https://digitalcommons.nyls.edu/fac_other_pubs/177)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.



WHO WE ARE ∨

JOIN US

SUPPORT

NEWSLETTER

WORDS

IMAGES

MACHINES

NEWS

FEATURES ∨

EVENTS

# THE HIGH POWER OF THE LOWER COURTS

12.7.2016



BY DONI GEWIRTZMAN



In 2010 the National Rifle Association (NRA) and its legions of gun-rights supporters were on the verge of a constitutional revolution. In a pair of landmark decisions,<sup>1</sup> the Supreme Court struck down gun laws in Washington, DC, and Chicago, bringing the long-moribund Second Amendment back from the dead and clearing the way for a full-frontal constitutional assault on all forms of gun control regulation. But something strange has happened in the six years since the Supreme Court spoke its last words about the “right to bear arms.” Instead of a string of NRA legal victories, the expected gun-rights revolution never happened, effectively stonewalled by a group of around 800 men and women that are usually an afterthought in most conversations about American constitutional law: lower federal-court judges.

As it turns out, this isn’t the first time lower courts have staged an under-the-radar constitutional rebellion by finding ways not to follow the Supreme Court’s latest trend line. In the 10 years after the Supreme Court ordered the desegregation of public schools in 1954, lower courts effectively made sure that *Brown v. Board of Education*’s transformative potential was never realized. And, despite repeated efforts by the Supreme Court to roll back federal legislative power during the 1990s, lower federal courts largely disregarded the Court’s invitation to start an extended steel-cage throw-down with Congress.

**THE SUPREME COURT’S POTENTIAL  
FOR CONSTITUTIONAL HEROISM OR  
MISCHIEF IS DEPENDENT ON A  
NETWORK OF SUBTERRANEAN  
LOWER-COURT JUDGES.**

Yet, when it comes to constitutional scholarship from the legal academy, lower courts remain largely overlooked and ignored. More often than not, lower court judges are either entirely missing from accounts of American constitutional law, or portrayed as dutiful agents of the Supreme Court, proudly displaying their “What Would SCOTUS Do?” bumper stickers as they mindlessly enforce the

Court's proclamations about what the Constitution means. The standard account of how constitutional interpretation works starts looking a lot like a top-down corporate structure that issues directives from a home office at One First Street, which are then dutifully implemented by faceless judicial bureaucrats in far-off local branches.

In a pair of recent articles, federal courts scholars [Neil Siegel](#) and [Richard Re](#) try to remind us what's lost in this act of collective academic amnesia, offering a vision of the federal judiciary that looks less like *The Office* and more like *Silicon Valley*: a network of interdependent nodes where messages are sent not only from the top-down, but from the bottom-up. Taken together, Siegel's "[Reciprocal Legitimation in the Federal Courts System](#)"<sup>2</sup> and Re's "[Narrowing Supreme Court Precedent from Below](#)"<sup>3</sup> offer a much-needed antidote to our obsessive focus on the Supreme Court, which dominates both popular and academic accounts of how constitutional law is made.

Siegel is interested in how the Supreme Court and lower courts work together to change what the Constitution means. His story is a baroque, three-act collaborative drama he calls "reciprocal legitimation." In Act One, a cautious and insecure Supreme Court wants to move constitutional doctrine in a new direction, but worries that it doesn't have enough legal support to make the big leap, like a flirtatious teenager scared to make the first move. So the Court, hearing a case that came to it from a lower court, issues a narrow judicial opinion to send a signal to all lower courts about where it wants the law to go. It doesn't tell them outright; it plants subtle messages in oral arguments, and in the opinion itself, that it's open to moving in a new direction. In Act Two, lower federal courts pick up on that signal, using the Court's narrow decision as legal support to make the broad shift the Court itself was too scared to make, expanding the decision's meaning well beyond anything the Court explicitly said. Finally, in Act Three, a grateful Supreme Court relies on these expansive lower-court decisions as legal authority to cast the final blow for a major change in doctrine.

Exhibit A for Siegel's theory is same-sex marriage. In Act One, the Court ruled in *United States v. Windsor*<sup>4</sup> that the federal Defense of Marriage Act violated the 14th Amendment. But in a moment of caution, Justice Anthony Kennedy's majority opinion explicitly left open the question of whether *state* prohibitions on same-sex marriage might also violate the 14th Amendment. In Act Two, LGBT legal organizations immediately used *Windsor* to instigate a quick set of lower court decisions overturning state-level prohibitions, expanding *Windsor's* meaning to include a full-scale embrace of marriage equality. Finally, in Act Three, the Court in *Obergefell v. Hodges*<sup>5</sup> relied upon this new mountain of lower court

decisions as legal authority to deliver the deathblow to all same-sex marriage prohibitions.

 *A family in Iowa City celebrating the Supreme Court's decision on marriage equality*. Photograph by Alan Light / Flickr

*A family in Iowa City celebrating the Supreme Court's decision on marriage equality. Photograph by Alan Light / Flickr*

If Siegel is focused on how judicial networks collaborate to move law in a new direction, Richard Re is interested in how lower courts push back and limit the Court's power. His story involves lower court judges using ambiguity in Supreme Court decisions to constrain the Court's influence by "narrowing from below." A lower court deciding a new case that arrives after a Supreme Court decision can decide that the Court's legal interpretation either: 1) directly applies to the new case and dictates an outcome, or 2) does not apply, leaving the lower court free to resolve the case as it sees fit. By choosing Interpretation Two, lower courts have effectively "narrowed" the meaning of the Supreme Court's decision. They aren't openly defying their bosses; they're just using ambiguity in the Court's directives as a cudgel to nudge constitutional law in a slightly different direction.

As one example, Re looks at how lower courts have interpreted the "right to bear arms" and the Second Amendment. Instead of following the Supreme Court's lead after two major decisions striking down gun control laws, lower courts "narrowed from below," turning the Court's landmark Second Amendment decisions into a "mostly symbolic victory" for gun-rights activists—by using ambiguities in the Court's reasoning to uphold a range of state and local gun control laws. Re reminds us that without the cooperation of lower court judges, the Supreme Court is definitely still a court, but something less than supreme.

**LOWER COURTS AREN'T OPENLY  
DEFYING THEIR BOSSES; THEY'RE  
JUST USING AMBIGUITY TO NUDGE  
CONSTITUTIONAL LAW IN A  
SLIGHTLY DIFFERENT DIRECTION.**

Taken together, Siegel's and Re's accounts suggest new ways of reading Supreme Court opinions, and a more expansive vision of constitutional law as "text." Among its many responsibilities, the Supreme Court manages a huge judicial bureaucracy that performs much of the day-to-day grunt work of interpreting, implementing, and enforcing the United States Constitution. This obvious but often overlooked fact requires us to read Supreme Court opinions with an eye toward detecting signals that the Court sends to lower courts, and toward opportunities for discretion that might allow those courts to control the decision's scope. This search for signals expands the "text" of constitutional law well beyond Supreme Court opinions, to include not only the subsequent actions of lower courts, but also the many mechanisms that the Court might use to send such signals: including oral arguments and a range of procedural devices to quickly affirm—or decline to review—actions taken by lower courts.

Both articles also spotlight the ways our collective fetishization of the Supreme Court distorts accounts of how constitutional law gets made. Over the last 15 years, constitutional scholars and popular commentators have increasingly treated constitutional change as a high-level conversation taking place between the Supreme Court and public opinion, with the Court responding to actions by political leaders or social movements while the rest of the country watches from the sidelines. Siegel and Re explain how the entire judicial branch participates in that story. When lower court judges "narrow" or engage in "reciprocal legitimation," they help change law. In turn, it's hard not to leave these articles with a somewhat diminished view of the Court's power, where "the Nine's" potential for constitutional heroism or mischief is dependent on a network of subterranean lower-court judges with their own agendas and ideas about constitutional meaning.

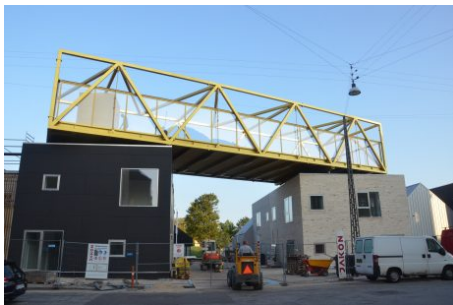
Finally, Siegel and Re remind us that the act of interpreting the Constitution, when seen from below, is more democratic than we might think. In our system, the power to make constitutional law is diffuse: it empowers legions of federal and state judges to make daily determinations about what the Constitution means, in courthouses all across the country. While other legal systems—in places like Germany, South Africa, and Columbia—give a small handful of elite judges on a specialized court the exclusive power to say what their constitution means, ours doesn't. In our system, "We the People" can exercise influence over our Constitution not simply through elections or activism or judicial appointments, but through the actions of lower court judges, whose courtrooms expose them to the lives and struggles of ordinary citizens on a far more frequent basis than the rarified world inhabited by nine graduates of elite law schools that operate out of corporate HQ in Washington, DC. When we erase lower court judges from the story of constitutional law, we run the risk of losing ourselves in the process. ■

- 
1. McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008). [↗](#)
  2. Neil S. Siegel, “Reciprocal Legitimation in the Federal Courts System: Racial Segregation, Reapportionment, and Obergefell Appendix A,” *Vanderbilt Law Review*, vol. 70 (forthcoming 2017). [↗](#)
  3. Richard M. Re, “Narrowing Supreme Court Precedent from Below,” *Georgetown Law Journal*, vol. 104, issue 4 (2016) p. 921. [↗](#)
  4. United States v. Windsor, 133 S. Ct. 2675 (2013). [↗](#)
  5. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). [↗](#)
- 

Featured image: *The Warren Court (responsible for crucial decisions such as Brown v. Board of Education and Loving v. Virginia), taken 1953.* Image courtesy of United States Library of Congress / Wikimedia Commons

---

#GOVERNMENT #HUMAN RIGHTS #LEGAL #POLITICS



NEXT ARTICLE

## PLANNING HAPPINESS: A POSTCARD FROM CHRISTIANSHAVN, COPENHAGEN

BY CHRISTINA LUPTON



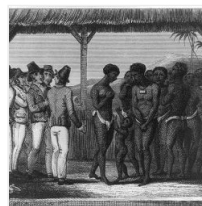
---

## YOU MIGHT ALSO LIKE



### JILL LEPORE ON THE CHALLENGE OF EXPLAINING THINGS

BY B. R. COHEN



### THE CRITIQUE OF RACIAL LIBERALISM

BY NEIL ROBERTS



### THE BIG PICTURE: DEFENDING SOCIETY

BY WENDY BROWN



### POPULISM, RIGHT AND LEFT

BY MATT WILDE

### ATHLETE ACTIVISTS

BY JULES BOYKOFF

### WILLIAM BRADFORD HUIE'S "THE KLANSMAN" @50

BY RICÉ RICHARDSON

© 2018 PUBLIC BOOKS.™ ALL RIGHTS RESERVED