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FROM THE COURTHOUSE TO THE CHALKBOARD

Thomas F. Burke *

MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012). Pp. 288. Hardcover \$22.91.

I have taught Gerald Rosenberg's *The Hollow Hope*¹ many times, but one occasion I will never forget. A student, asked to give a presentation on Rosenberg's chapter on the impact of *Brown v. Board of Education*, began by drawing on a chalkboard from memory a timeline of some of the developments in American race relations in the years following *Brown*.² He wrote in small letters, and filled the entire chalkboard. There were the major protests and marches, the rise of civil rights leaders and organizations, shifts in the economy, demographic changes, developments in popular culture, international influences, significant legislation—and of course the major court cases, represented by a few marks in a sea of chalk.

I might have congratulated myself as a teacher for stimulating the student to problematize the relationship of law and society in such a humble yet telling way, but this was no ordinary class, and he was no ordinary student. The class was a group of judges studying for graduate degrees in Justice Studies at the University of Nevada, people perhaps particularly attuned to the limits of judicial power. The student was the Honorable Calvin Hawkins, a trial judge in the Indiana court system. Judge Hawkins had served in the Civil Rights Division of the Justice Department and so had a particularly useful perspective on the role of litigation in the civil rights struggle. He used the chalkboard to make an essential point: law is just one in a sea of interrelated social forces, and trying to draw a line between a particular case and a social outcome is extraordinarily difficult.

Reading *From the Closet to the Altar*,³ Michael Klarman's judicious account of the role of law in the progress of the campaign for same-sex marriage, I was reminded of that big chalkboard. Klarman uses the story of the gay and lesbian rights movement to raise questions about the role of law and courts in politics. I love narratives, and I think Klarman's will be well received, like his earlier book on *Brown v. Board of Education*,⁴ but in part because his book is so well executed, it illustrates

* Professor of Political Science, Wellesley College. Thanks to Jeb Barnes and Ken Kersch for their advice on a previous draft, and to my students at the Judicial Studies Program at the University of Nevada, especially the Honorable Judge Calvin Hawkins, for teaching me their perspectives on judicial power.

1. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

2. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

3. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012).

4. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR*

the limits of this kind of narrative for helping us to understand judicial power.

Klarman's claim is that state court same-sex marriage decisions, while "probably" advancing the cause of lesbian and gay marriage, have also caused backlashes that have had deleterious effects for the gay and lesbian rights movement and for the Democratic Party.⁵ This is different from Rosenberg's claims about constraints on judicial power in *The Hollow Hope*, but it is framed in the same way: we are asked to imagine a counterfactual, a different world in which courts did not act, and think about how that world compares to the one we live in. Klarman's claim is that without state cases like *Baehr v. Lewin* and *Goodridge v. Department of Public Health*, the gay and lesbian rights movement would be in better shape, and separately, that John Kerry might have been president in 2004.⁶ (Whether that would have benefitted the Democratic Party in the long run is anyone's guess.) To try to convince us of this, Klarman provides a compact history of the gay and lesbian rights movement in which he pays particular attention to backlashes. Along the way he attempts to measure the collateral damage wrought by backlashes, particularly those generated by same-sex marriage litigation.

One virtue of Klarman's book is that while law is in the foreground, the whole chalkboard is evoked. Klarman begins his narrative in the 1950s, not so long ago, when even progressive groups considered homosexuality a sickness or a sin rather than a political cause. The position of gays and lesbians was such that when the first significant gay rights group, the Mattachine Society, formed in 1951, it did so in secret, with members using a cell structure and aliases in order to avoid being unmasked.⁷ The stance of the American Civil Liberties Union ("ACLU") at the time was that homosexuals were "socially heretical or deviant" so punishing homosexual acts raised no civil liberties issues.⁸ In the 1960s, the attack on the "homophobic consensus" commenced, mostly in the big cities and, quietly, among legal and therapeutic professionals. The ACLU, having championed sexual privacy in *Griswold v. Connecticut*,⁹ reversed its stance on homosexuality and began fighting for the rights of gays and lesbians.¹⁰

The famous Stonewall Riot of 1969, in which gays fought back against a police raid on a gay bar in New York City, stimulated a new era of gay liberation. Gay and lesbian rights groups proliferated, and in the 1970s, politicians and cultural figures began voicing their support for the rights of homosexuals.¹¹ In 1973, the American Psychological Association and American Medical Association de-listed homosexuality as a mental illness, and by 1977 nearly half the states, influenced by the Model Penal Code, had quietly repealed their sodomy statutes.¹²

All of this sets the stage for the first backlash in the book, which erupted in

RACIAL EQUALITY (2004);

5. *Id.* at 218.

6. *Id.* at 112, 212. *See also* *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

7. KLARMAN, *supra* note 3, at 6.

8. *Id.*

9. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. KLARMAN, *supra* note 3, at 6.

11. *Id.* at 22-23.

12. *Id.* at 23.

1977, after Dade County Florida enacted an ordinance banning discrimination against homosexuals.¹³ The campaign to overturn this ordinance turned a former Miss America runner-up, singer Anita Bryant, into a star. Bryant's organization, Save Our Children, collected \$200,000 as part of a drive to repeal the ordinance through a county referendum.¹⁴ Gay rights groups around the country fought back, raising \$300,000 for their campaign, and a county referendum election became the first prominent battlefield in the cultural struggle over gay rights.¹⁵ It proved a major defeat for gay and lesbian rights, with 68 percent of Dadeans voting to overturn the ordinance.¹⁶ Across the United States, several other municipalities also rolled back their ordinances in the 1970s.¹⁷ Despite some signs of progress, the gay rights movement was just getting started. In the late 1970s, Klarman notes, 72 percent of Americans still considered homosexuality "always wrong."¹⁸

And then things seemed to get worse. The rise of the Moral Majority and the Christian Right was followed by the plague of AIDS. On the legal front came *Bowers v. Hardwick*, in which the Supreme Court, by a five to four decision, concluded that criminalizing homosexual (and heterosexual) acts was within the American tradition and so no violation of the Fourteenth Amendment.¹⁹ But all these developments stimulated mobilization. In the 1980s and 1990s, a bevy of gay and lesbian groups grew up, from the AIDS Coalition to Unleash Power ("ACT UP") to the Log Cabin Republicans, and more and more openly gay politicians were elected.²⁰ Gay and lesbian rights groups became more closely allied with the Democratic Party against the surging cultural conservatism of Republicans; the weight of the evidence suggested that the Democrats benefitted from this line-up. A New York Times article summarized the situation in 1992 as "Gay Politics Goes Mainstream."²¹ Perhaps the biggest engine of social change, as gay rights icon Harvey Milk had prophesied, was the movement of gays and lesbians out of the closet. By 1992, 43 percent of Americans reported knowing a homosexual—twice the percentage of just seven years before.²² As has since become clear, the emptying out of the closet, and the resulting public visibility of gays and lesbians, changed the way young people are socialized about sexual orientation, so that since the 1970s, each generation has become less and less homophobic, transforming the politics of gay rights. The momentum of this underlying social transformation seems largely unaffected by the political-legal events that Klarman details, undermining the emphasis he puts on moments of political backlash.

Bill Clinton's first year in office, 1993, was a big year for backlashes. Clinton's

13. *Id.* at 26.

14. *Id.* at 27.

15. *Id.*

16. *Id.* at 27-28.

17. *Id.* at 29.

18. *Id.* at 31.

19. *Bowers v. Hardwick*, 478 U.S. 186, 191-95 (1986); KLARMAN, *supra* note 3, at 37.

20. KLARMAN, *supra* note 3, at 40, 44.

21. Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 11, 1992, <http://www.nytimes.com/1992/10/11/magazine/gay-politics-goes-mainstream.html?pagewanted=all&src=pm>.

22. *Id.*

proposal to remove restrictions on gays and lesbians in the military created a furor, leading his administration to the deeply problematic “don’t ask don’t tell” policy.²³ The Supreme Court of Hawaii generated another backlash when it ruled in *Baehr v. Lewin* that a state law restricting marriage to opposite sex couples was a sex-based classification, and thus had to be based on a compelling interest.²⁴ While the Hawaii judicial system wrestled over the resulting legal issues, a political battle ensued. A referendum giving the state legislature the constitutional power to ban same-sex marriage was passed overwhelmingly in 1998, 69 percent to 31 percent.²⁵

Baehr brought the marriage issue to national attention, and gave cultural conservatives an issue on which the public clearly sided with them—nationally, same-sex marriage opponents outnumbered supporters roughly two to one. In 1994, Republicans gained majorities in both the House and Senate, and so were able to shepherd through Congress the Defense of Marriage Act (“DOMA”), which defined marriage for federal purposes as between a man and a woman, cutting off same-sex couples from federal benefits, even if under state law they were married.²⁶ With public opinion so lopsided, even Democrats mostly voted for the measure. It passed by overwhelming margins in the Senate and House, and was signed by President Clinton in 1996.²⁷ At the state level, meanwhile, by 2001, thirty-five states had enacted their own defense of marriage laws, usually by overwhelming margins.²⁸

Baehr is the first of the several judicial backlashes that Klarman analyzes. There followed *Baker v. Vermont*, *Goodridge v. Public Health Department*, *In re Marriage Cases*, and *Varnum v. Brien*.²⁹ In Klarman’s account, the particularities of each ruling don’t seem to have much influence on the shape of the backlash that results. *Baker*, for example, was arguably a modest decision. The Vermont Supreme Court held that denying same sex couples the state benefits of marriage violated the “common benefits” provision of the state constitution, and invited the legislature to fix the problem in whatever way it wished, including through some kind of non-marriage arrangement.³⁰ Yet *Baker* turned peaceful little Vermont upside down, making marriage the dominant political issue in the state, and leading the Democrats to lose their majority in the state’s lower house in the following year’s election. In contrast to *Baker*, the Massachusetts judges in *Goodridge* were not inclined to start a “dialogue” with the legislature—they specifically ruled that any law short of full marriage equality would be unconstitutional.³¹ That ruling was initially quite unpopular, and it required some elaborate legislative maneuvering to hold off a referendum reversal. Yet, same-sex marriage did not become a dominant issue in Mas-

23. KLARMAN, *supra* note 3, at 43.

24. *Baehr v. Lewin*, 852 P.2d 44, 67 (1993); KLARMAN, *supra* note 3, at 56.

25. *Hawaii Gives Legislature Power to Ban Same-Sex Marriage*, CNN.COM, Nov. 3, 1998, <http://www.cnn.com/ALLPOLITICS/stories/1998/11/04/same.sex.ballot/>.

26. H.R. 3396, S. 1740, 104th Cong. (1996) (codified at 1 U.S.C. § 7 (1996)); KLARMAN, *supra* note 3, at 61-62.

27. KLARMAN, *supra* note 3, at 63.

28. *Id.* at 59.

29. *Baker v. Vermont*, 744 A.2d 864 (1999); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (2003); *In re Marriage Cases*, 43 Cal.4th 757 (2008); *Varnum v. Brien*, 763 N.W.2d 862 (2009).

30. KLARMAN, *supra* note 3, at 77.

31. *Goodridge*, 798 N.E.2d at 965-66, Opinion of the Justices to the Senate, SJC-09163 (Feb. 3, 2004).

sachusetts politics. In the elections that followed, Klarman suggests that only anti-marriage politicians appeared to suffer at the polls.³²

Nationally, however, the backlash to same-sex marriage that followed *Goodridge* was ferocious. In the ensuing 2004 election, thirteen states enacted constitutional provisions defining marriage as between a woman and a man.³³ In nine of these states, the constitutional amendment also barred civil unions, in a few cases effectively repealing benefits that had already been given to same-sex couples.³⁴ Thirty-nine states had already enacted defense of marriage laws by this time, but the effect of constitutionalizing such laws was to make them much harder to overturn.³⁵

Klarman also raises the possibility that *Goodridge*, by mobilizing cultural conservatives, swung the 2004 presidential election.³⁶ Republicans clearly did see the political uses of the issue, at least for mobilizing evangelical Christians: George W. Bush endorsed a constitutional amendment to define marriage as between a man and a woman, and targeted messages about this stance to conservative Christians.³⁷ But Bush had to walk a fine line, as he had to worry about alienating more moderate and secular voters by seeming anti-gay, so the constitutional amendment was not one of his major themes in the campaign.³⁸ Klarman's analysis focuses on Ohio, where Bush prevailed by a mere 119,000 votes, and where a defense of marriage ballot measure passed 62 percent to 38 percent.³⁹ Analyzing Ohio in isolation from voting trends in other states can be misleading, however: assessing the impact of the marriage issue requires a sophisticated quantitative analysis of voting patterns across the whole nation—an effort well beyond the scope of the book. Klarman cites a bunch of such studies that come to differing conclusions about the impact of the same-sex marriage issue. I think the weight of the evidence, and the stronger studies, cast doubt on marriage as a pivotal issue in the election, but Klarman does not overclaim on this point. He merely concludes that “no one can possibly know for sure.”⁴⁰

Most of the backlashes Klarman recounts were the result of judicial rulings like *Goodridge*, but as Klarman demonstrates, backlashes can be created by legislation, as in the Dade County ordinance that attracted Anita Bryant's ire, or even by executive action, as when San Francisco Mayor Gavin Newsom in 1994 authorized city clerks to grant marriage licenses—an act that Klarman says “more than the *Goodridge* decision . . . ignited the powerful political backlash of 2004.”⁴¹ An im-

32. KLARMAN, *supra* note 3, at 94-95.

33. *Id.* at 106.

34. *Id.* at 108.

35. *Id.* at 106.

36. *Id.* at 111.

37. *Id.* at 114.

38. David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Presidential Election*, 72 PUB. OP. Q. 399 (2008) (noting that former President George W. Bush's stance did in fact demobilize some of his more secular supporters in states with ballot measures on same-sex marriage, thus partly counterbalancing the mobilizing effect on evangelicals in those states).

39. KLARMAN, *supra* note 3, at 112.

40. *Id.* at 113.

41. *Id.* at 192.

portant lesson of the book is that a federalist system creates difficulties for social change movements because advances in one state can have pernicious consequences in the others.

So why does Klarman's book focus primarily on the judiciary as a source of backlash? Klarman's argument is that courts are unusually prone to stimulating backlash:

Political backlash results from government action that strongly contravenes public opinion. Whether that action derives from legislatures or courts seems relatively unimportant. Yet courts are more likely than legislatures to take action that is sufficiently deviant from public opinion to generate powerful backlash.⁴²

Judges are more likely to contravene public opinion, Klarman argues, because they are socioeconomic elites, and especially on issues such as civil liberties, they are more liberal than the average citizen.⁴³ And while many state judges are elected, they are less frequently involved in competitive elections, so they may be less oriented to public opinion than legislators. This seems a highly plausible explanation for why same-sex marriage advanced more quickly in state courts than in state legislatures, and in the federal courts than in Congress. It particularly explains what would otherwise seem anomalous, that most of the important same-sex marriage decisions have been issued or supported by Republican judges.⁴⁴ These judges clearly have exhibited a different brand of Republicanism from that seen in many state legislatures and in Congress.

The judges, Klarman contends, pushed the lesbian and gay rights movement in a direction that was not politically prudent.⁴⁵ Klarman shows that prior to the court rulings, gay rights activists were not focused on marriage as a political goal, and contends they would not have pursued it so vigorously in the absence of the court rulings.⁴⁶ That would have been the wiser path, according to Klarman: Same-sex marriage was a fight that should have been postponed until after lesser battles had been won. An incremental approach, starting with more innocuous issues, such as hate crimes and non-discrimination in employment, would have been more popular and provoked less counter-mobilization.⁴⁷ Same-sex marriage was an issue designed to provoke, just as school desegregation provoked Southern whites, stymieing progress in race relations in the South for many years.⁴⁸

42. *Id.* at 169.

43. *Id.* at 170.

44. Klarman lists Judge Joseph Tauro in the Massachusetts Federal Court decision on the Defense of Marriage Act, Judge Vaughn Walker in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), Massachusetts Supreme Judicial Court Chief Justice Margaret Marshall, California Supreme Court Chief Justice Ronald George, Iowa Supreme Court Justice Mark Cady, and Connecticut Supreme Court Justice Richard Palmer. KLARMAN, *supra* note 3, at 171. U.S. Supreme Court Justice Anthony Kennedy can be added to the list: he wrote the opinion in the Supreme Court's decision striking down the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

45. KLARMAN, *supra* note 3, at 171-72.

46. *See id.* at 174-78.

47. *Id.* at 177.

48. *Id.* at 172.

Klarman seems on solid ground when he argues that the gay and lesbian rights movement would have faced less opposition if it had concentrated on nondiscrimination laws, which polling suggests were quite popular by the 1990s. The trouble comes in weighing the costs of the path that was taken instead. The backlashes certainly ended some political careers, and judicial careers in Iowa, where the uprising against *Varnum v. Brien* resulted in three supreme court judges losing their retention elections.⁴⁹ But for the lesbian and gay rights movement, the accounting is necessarily speculative. Klarman claims that the focus on same-sex marriage has retarded other goals of the movement, such as a national anti-discrimination law, but he does not analyze what happened during Congress's consideration of the Employment Nondiscrimination Act. There is no evidence that the backlashes to *Goodridge* and the other cases had much collateral effect on public opinion about other goals of the movement such as nondiscrimination laws, which have been overwhelmingly supported in public opinion polling for many years.⁵⁰ Indeed there is no convincing evidence that the backlashes have had more than a temporary effect on national public opinion regarding same-sex marriage.⁵¹

The most clear-cut loss from backlash is the defense of marriage provisions that are now enshrined in twenty-nine state constitutions.⁵² Although state constitutions are typically far more malleable than the U.S. Constitution, amending them requires a lot more political effort than simply passing a statute creating civil unions or same-sex marriage. This raises the prospect that even as public opinion swings decisively in favor of same-sex marriage, some states, particularly in the South, will continue to ban marriage and even civil unions. (Of course if the Supreme Court were to rule that such provisions were unconstitutional, it would eliminate all of them in one fell swoop.)

49. *Id.* at 151.

50. A comprehensive analysis of public opinion about gays and lesbians by Patrick J. Egan, Nathaniel Persily, and Kevin Wallsten shows a significant drop in support for legalizing homosexual relations around the time of *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003). Polling from Gallup on support for nondiscrimination in employment and the military, however, shows a barely perceptible dip that is likely within the margin of error. Patrick J. Egan et al., *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234, 241 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008). It should be noted that the authors of this analysis find it hard to disentangle the backlash effects of *Lawrence*, presumably a relatively modest judicial step, from those in *Goodridge*, the focus of Klarman's analysis. *See id.* at 256.

51. Egan et al. conclude public support for same-sex marriage began to fall after *Lawrence* in the summer of 2003 and continued to fall through *Goodridge* and the 2004 election, but then rebounded. By the summer of 2005, support was back to pre-*Lawrence* levels, and back to an upward trajectory. *See id.* at 242-44. Nate Silver, combining a bunch of polls on gay marriage from 1996-2012, produces an analysis that seems to show growing support in the 1990s, a plateau in early 2000s, but then a significant rise beginning in 2004. Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What it Means*, 538 Report, N.Y. TIMES, Mar. 26, 2013, http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0. Gallup's time trend looks a bit different, with support growing through 2004, then plateauing for several years followed by a big jump around 2011. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP POLITICS, July 29, 2013, <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>. Pew, starting in 2001, shows a slight downward trend in support until 2005, when the trend reverses and support grows. *Gay Marriage: Key Data Points from Pew Research*, PEW RESEARCH CENTER, June 11, 2013, <http://www.pewresearch.org/key-data-points/gay-marriage-key-data-points-from-pew-research/>. The different patterns across these sources likely arise from differences in question-wording, sampling, and random error.

52. *Marriage Center*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited Jan. 19, 2014) [hereinafter Marriage Center].

The problem here is with the counterfactual: we cannot assume that, in the absence of *Goodridge* and the other rulings, there would have been no effort to enact state constitutional bans on same-sex marriage. In fact it seems quite likely that however marriage arose as an issue, the adoption of marriage in some more liberal states, even states in which public opinion had swung in favor of same-sex marriage, would have led Christian Right activists in other states to propose defense of marriage amendments. It is possible that, especially if the marriage issue arose later in time, there would be fewer such amendments, but how many fewer?

There is a parallel difficulty in weighing the benefits of same-sex marriage litigation for the movement. Klarman acknowledges in his conclusion some of the possible ways in which the same-sex court decisions may have advanced the lesbian and gay rights movement, but I wonder if he gives them enough weight. From the perspective of some radical gay activists, who criticized the pursuit of marriage as "hetero-normative," it must have been infuriating to see access to marriage and the military emerge as the two defining goals of the gay and lesbian rights movement. For many moderates and conservatives, however, these goals are reassuring. By highlighting the lives of gays and lesbians who wish to serve their country by defending it, and who want to live together on the same terms as everyone else, they powerfully demonstrate the conventionality of homosexuals, their ordinariness. The faces of the gay and lesbian rights movement became couples, usually of longstanding duration, who for years had been denied any legal recognition of their bond. It is not at all clear that a campaign for hate crimes or anti-discrimination legislation would have so dramatically and profoundly mainstreamed homosexuality.

Klarman claims that by focusing on same-sex marriage as a goal, the gay and lesbian movement has forgone civil unions even in states where authorizing them would be popular with the public.⁵³ He gives as his primary examples New York and Maine,⁵⁴ but New York authorized same-sex marriage in 2009 and Maine followed in 2012; they hardly seem like disasters for the gay and lesbian rights movement.⁵⁵ Only four states currently occupy the middle ground of providing benefits to gay and lesbian couples, but not allowing them to marry.⁵⁶ It would be interesting to find out how many states that do not recognize same-sex relationships nevertheless have majority support for civil unions. That is a long way, however, from proving that, in a *Baehr*-less, *Goodridge*-less, *Varnum*-less world, those states would have enacted civil union laws. As Klarman acknowledges, civil unions are today seen as the moderate option precisely because of the campaign for same-sex marriage, which framed unions as the compromise choice.⁵⁷ No surprise then that polling demonstrates a rise in support for civil unions around the time of *Goodridge*.⁵⁸ The same George W. Bush who voiced support for a defense of marriage amendment to

53. KLARMAN, *supra* note 3, at 213.

54. *Id.*

55. Drew Desilver, *How Many Same-Sex Marriages in the U.S.? At Least 71,165, Probably More*, PEW RES. CTR., June 26, 2013, <http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more/>.

56. Marriage Center, *supra* note 52.

57. KLARMAN, *supra* note 3, at 179-80.

58. Egan et al., *supra* note 50, at 253-55.

the Constitution also endorsed civil unions during the 2004 campaign.⁵⁹ Would Bush and so many other politicians have embraced civil unions so quickly if not for *Goodridge*?

The difficulty of weighing such counterfactuals seems inevitable, particularly in a historical narrative about a social movement that is subject to so many influences, so many marks on the chalkboard coming together. Scholars have produced many such narratives devoted to social movements that had a litigation component, and some of these studies, like Klarman's, are specifically aimed at raising questions about the effects of law and legal institutions on politics.⁶⁰ To supplement these historical narratives, I urge scholars to consider as an alternative the method of comparison. Did nations with more judicial activity on the issue of gay and lesbian rights have different outcomes from those in which the judiciary took a more modest role? Klarman claims that "[i]n other countries, where courts typically play a less central role on issues of social reform, gay rights progress has occurred more incrementally through legislatures and has generated less political backlash," and cites a few sources to back up this claim.⁶¹ The most sweeping comparative study he cites, however, which covers Europe, Canada, and the United States, primarily ascribes the American pattern to the greater religiosity and cultural conservatism of Americans as compared to citizens of other affluent nations. (Backlashes must be stimulated by some institution, but they also require backlashers, and the United States seems to have had a copious supply ready to be provoked.) Indeed the study cites as one cause of the lagging same-sex marriage rights in the United States "the absence of leadership in the area of sexual diversity rights by the U.S. Supreme Court," contrasting that with the greater support provided by courts in Canada.⁶² It may be that nations that have judicialized their policies regarding sexual orientation have been prone to greater backlash, but a more precise comparative study would be useful to probe this claim. Roughly twenty-five years ago, Mary Ann Glendon concluded, based on a comparative study of abortion politics, that *Roe v. Wade*, by framing abortion as a matter of individual rights, had delayed the resolution of the abortion issue in the United States.⁶³ I wish there were more truly comparative studies that followed in Glendon's footsteps.

Even if one wishes to stick to the United States, comparisons are available. Although the United States is prone to "adversarial legalism,"⁶⁴ not all areas of American public policy have become judicialized, and we might compare fields like abortion and gay rights to those in which courts have declined to take the leading

59. KLARMAN, *supra* note 3, at 114.

60. For example, see JEB BARNES, *DUST UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMON SENSE POLICY REFORM* (2011); CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* (2010); GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (2006); R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994); ROSENBERG, *supra* note 1.

61. KLARMAN, *supra* note 3, at 167.

62. David Rayside, *The United States in Comparative Context*, in *THE POLITICS OF SAME-SEX MARRIAGE* 341, 356 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

63. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1989).

64. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001)

role. The Supreme Court, for example, opted not to recognize a “right to die” in the Constitution, and that has left the issue to state legislatures and courts to play out.⁶⁵ How has the whole issue of compassionate care for people with terminal illnesses developed in the wake of the Court’s retreat? Has the movement for a right to die provoked much countermobilization and backlash? Has nonjudicial policymaking addressed the underlying issues satisfactorily? Rather than weighing counterfactuals, Klarman’s technique, we might try to compare instead real outcomes, albeit in other policy areas.

The most outstanding fact about the campaign for same-sex marriage, and movement for gay and lesbian rights more generally, is how quickly it went from improbable to inevitable. Klarman, who finished his book in 2012, labels his concluding chapter the “inevitability of gay marriage” and largely predicts what has happened in the year since—the Supreme Court’s striking down of part of DOMA, and President Obama’s endorsement of same-sex marriage.⁶⁶ But Klarman doesn’t anticipate the speed of the change; he guesses that Obama will endorse marriage after the 2012 election, presumably to forestall a backlash,⁶⁷ when in fact Obama made his announcement six months before, to widespread applause—and without much pushback from Republicans, who seemed determined to move on to other issues.⁶⁸ The speed with which the same-sex marriage cause has advanced makes the story Klarman tells dramatic, but also undermines its usefulness for probing the ways in which litigation advances or retards social change movements. I can imagine scenarios in which the United States turned away from the death penalty in the absence of *Furman v. Georgia*,⁶⁹ and I can imagine how the abortion issue might have been better settled if not for *Roe v. Wade*.⁷⁰ It is harder for me to imagine the scenario Klarman invokes, in which the gay and lesbian rights movement was significantly more successful or swift in reaching its goals. I suspect that as the years go by, the backlashes on which Klarman focuses his attention will seem more and more like muddy patches on a very fast road.

65. See *Washington v. Glucksberg*, 521 U.S. 709 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997).

66. KLARMAN, *supra* note 3, at 193.

67. *Id.* at 196.

68. Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should be Legal*, N.Y. TIMES, May 9, 2012, <http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html>.

69. *Furman v. Georgia*, 408 U.S. 238 (1972).

70. *Roe v. Wade*, 410 U.S. 113 (1973).