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STEALTH BATTLES OVER CIVIL RIGHTS: TWO APPROACHES TO LOW-VISIBILITY CIVIL RIGHTS LITIGATION

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ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS (OXFORD UNIVERSITY PRESS 2015). PP. 280. HARDCOVER $51.

SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (OXFORD UNIVERSITY PRESS 2015). PP. 320. HARDCOVER $105.00.

INTRODUCTION

On June 26, 2015, the Supreme Court ruled in *Obergefell v. Hodges* that same-sex marriage is protected under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment overturning bans on same-sex marriage in fifteen states.[2] Immediately following Justice Anthony Kennedy's announcement of his 5-4 majority opinion, the Court's decision went viral. A crew of reporters from major cable broadcast networks covered the breaking news live from the steps of the Supreme Court, with activists waving rainbow flags and equality signs celebrating in the background. Social media exploded with #SCOTUS hashtags.[3] In an impromptu speech from the Rose Garden the same morning, President Barack Obama announced that the Supreme Court had issued a momentous civil rights ruling, which "reaffirmed" the bedrock principle "that all Americans are entitled to equal protection of the law."[4] The White House lit up that evening in rainbow colors to celebrate this "victory for America,"[5] while state officials scrambled to issue public statements expressing either support or opposition to the ruling,

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2. 135 S. Ct. 2584, 2604–05 (2015).

3. *See A Social Media Snapshot: Public Opinion, Marriage Equality, and the Supreme Court*, SKDKNICKERBOCKER.COM (Apr. 30, 2015), http://www.skdknick.com/a-social-media-snapshot-public-opinion-marriage-equality-and-the-supreme-court/.

4. President Barack Obama, *Remarks by the President on the Supreme Court Decision on Marriage Equality*, OBAMAWHITEHOUSE.ARCHIVES.GOV (June 26, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality.

5. *Id*.

but generally careful to declare that they would abide by this new law of the land.[6] The outcome of *Obergefell*, wrote Professor Erwin Chemerinsky the following day on SCOTUSblog.com, "is the Court playing exactly the role that it should in society: protecting those who have been traditionally discriminated against and extending to them a right long regarded as fundamental."[7]

The two books under review here address a timely and important question from different angles: What is the relationship between public visibility and the current trajectory of civil rights litigation? As the example of *Obergefell* illustrates, news travels quickly in our digital age, marked by a 24/7 news cycle, social media, and the blogosphere. I opened this review with the example of *Obergefell* because the recent successes of the lesbian, gay, bisexual, and transgender (LGBT) movement sparked renewed discussion about the "rights revolution" and American society.[8] Yet *Obergefell* is just one example of the constant stream of media coverage of big political events—including warnings about impending national or international crises—commanding the attention of the American public. From the standpoint of most Americans today, politics seems more visible and sensational than ever, particularly with the advent of the controversial "Twitter Presidency" of Donald J. Trump.[9] But despite the hyper-visibility of landmark cases such as *Obergefell*, both Alison Gash[10] and Sarah Staszak[11] persuasively argue that we cannot grasp the landscape of civil rights in America today without also paying attention to what happens outside the public eye, or as Gash puts it "below-the-radar."[12]

In these two excellent books, Gash and Staszak maintain that there is another quieter and far less visible dimension of civil rights jurisprudence, which can be just as important in shaping the access to justice available to vulnerable citizens, on the one hand, and their chances of success in court, on the other. In different ways and using diverging approaches, they each shine a light on the subterranean politics of civil rights in the United States. By highlighting low-visibility forms of civil rights judicial policy-making, these books contribute in varying ways to the recent proliferation of work on hidden government, most prominently spearheaded by Suzanne Mettler (in *The Submerged State: How Invisible Policies Undermine American Democracy)*.[13] But while Mettler focuses on

6. *See* Audrey Ann Faber & Maresa Strano, *State Executive Responses to* Obergefell v. Hodges, BALLOTPEDIA.ORG, https://ballotpedia.org/State_executive_responses_to_Obergefell_v._Hodges (last visited Aug. 27, 2018).

7. Erwin Chemerinsky, *Symposium, A Landmark Victory for Civil Rights*, SCOTUSBLOG (June 27, 2015), http://www.scotusblog.com/2015/06/symposium-a-landmark-victory-for-civil-rights/.

8. *E.g.*, Robert S. Salem, *Intimate Integration: Lessons from the LGBT Civil Rights Movement*, 45 CAP U. L. REV. 33, 33–34 (2016); Jan Larson, *Marriage Equality Movement Found Inspiration in the 1960s Civil Rights Movement*, UWEC.EDU (Oct. 20, 2015), https://www.uwec.edu/news/news/marriage-equality-movement-found-inspiration-in-1960s-civil-rights-movement-779/.

9. *See* Gregory Korte, *Trump and the Twitter Presidency: @realDonaldTrump's Tweets Often Carry Legal Weight*, USATODAY.COM (November 8, 2017, 10:55 AM), https://www.usatoday.com/story/news/politics/2017/11/08/trump-and-twitter-presidency-realdonaldtrumps-tweets-often-carry-legal-weight/815980001/.

10. *See* ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS (2015).

11. *See* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015).

12. GASH, *supra* note 10, at 12.

13. SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 4, 7 (2011).

federal tax policy and other federal bureaucratic programs in which the role of government in providing fiscal benefits appears largely invisible to most Americans, Gash and Staszak turn to the realm of the judiciary, exposing important subterranean features of civil rights litigation. Both scholars agree that we must look beyond "grand acts of politics"[14]—or highly visible landmark civil rights cases like *Obergefell*—to more accurately understand the state of civil rights in contemporary America.

The differences between these two books are as noteworthy as their similarities. While Staszak's top-down approach emphasizes the threat that judicial retrenchment by elites in government poses to civil rights, Gash presents a more hopeful bottom-up account of creative activists and lawyers using low-visibility strategies to win civil rights victories for vulnerable citizens. Together, these books bolster our understanding of the uneven terrain of civil rights in America and shed new light on the shifting opportunities of vulnerable Americans seeking justice in court.

THE SUBTERRANEAN ASSAULT ON CIVIL RIGHTS: EXAMINING TOP-DOWN JUDICIAL RETRENCHMENT

Sarah Staszak, in *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*, offers a top-down account of elites in government engaging in efforts to scale back access to federal courts in the wake of the rights revolution of the 1960s and 1970s.[15] Taking an historical institutionalist approach, Staszak presents two main questions: "First, what explains the politics of institutional retrenchment in the judiciary? Second, what does it look like, and when and why is it more likely to occur?"[16] Staszak examines judicial retrenchment as a complex and multifaceted phenomenon in her effort to shed light on these questions, offering a detailed and insightful analysis of procedural retrenchment within the federal judiciary. In this section, I summarize the main points of her study and end by addressing its implications for the future of civil rights litigation in contemporary America.

Let us begin with the rights revolution. Staszak introduces her puzzle of judicial retrenchment by comparing the contemporary Supreme Court's civil rights jurisprudence to that of the Court during the "rights revolution."[17] Beginning in the 1950s with the Warren Court—and extending through the Burger Court of the 1960s and 1970s—the United States underwent what is now commonly referred to as the "rights revolution."[18] The rights revolution involved expanding governmental protection for vulnerable individuals and disadvantaged groups in the nation, and one of the most important mechanisms for accomplishing this was through a massive expansion of judicial power.

14. STASZAK, *supra* note 11, at 7, 217.

15. *Id.* at 7.

16. *Id.* at 8.

17. *Id.* at 1–8, 15.

18. *See* CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND THE COMMUNITY IN MODERN AMERICA (1998); MARK TUSHNET, *The Rights Revolution in the Twentieth Century*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA (Michael Grossberg & Christopher Tomlins eds., 2008); MICHAEL MCCANN, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Gilman & Clayton eds., 1999).

For instance, during the African-American Civil Rights Movement, the federal courts not only heard record numbers of racial antidiscrimination cases, but the federal judiciary also assumed increasing power to interpret statutory laws (most notably: the Civil Rights Act of 1964 and Voting Rights Act of 1965), and to make and enact public policy and oversee governmental institutions (e.g. particularly in the realms of school desegregation, busing, and voting rights cases). At the same time, federal judges took on a more prominent role in protecting minorities and women against workplace discrimination, strengthening constitutional protections for freedom of speech, press, and religion, the administration of welfare, expanded environmental protections, and even discovering a fundamental right to privacy covering reproduction, birth control, and abortion in the Constitution.[19] In sum, during this relatively short period of time, in which all three branches appeared to support expanding access to justice for hitherto excluded individuals and groups, we gained a "vastly broadened and empowered institutional judiciary," which Staszak emphasizes remains "a centerpiece of the modern American state."[20]

In light of recent civil rights victories like *Obergefell*, we might (upon cursory glance) assume that the "rights revolution" has not necessarily ended. However, rather than focus on major substantive rights decisions that attract widespread news coverage and visibility, Staszak suggests that the battleground over civil rights frequently happens in the much less visible arena of rule-making and procedural reform regulating who has access to the courts and under what conditions. Following legal theorist Dahlia Lithwick, Staszak refers to the *substantive* landmark civil rights cases as "Type A" stories, and labels the less-visible *procedural* developments as "Type B" stories.[21] She focuses on identifying and elucidating "Type B" examples of judicial retrenchment. Describing the common wisdom regarding the "Type A" causes of retrenchment, Staszak notes that "[w]e are now intimately familiar with the story of how, in recent decades, an increasingly conservative Supreme Court has used its authority in an attempt to scale back the developments of the New Deal and Civil Rights eras, and of conservative activists regularly lobbying Congress to do the same."[22] In contrast to this intensely partisan account, she posits that, "it is essential to recognize that change in the more 'subterranean' hidden realm of procedural rules is where actual construction in the availability of access to courts frequently occurs."[23]

Consider a prominent example of a recent "Type B" case, involving class action lawsuits. In 2011 in *Wal-Mart Stores Inc. v. Dukes*, the Supreme Court reversed the Ninth

19. The landmark cases associated with this shift in judicial power are legendary: Brown v. Board of Education, 347 U.S. 483, 495 (1954) (declaring racial segregation in public schools unconstitutional); Baker v. Carr, 369 U.S. 186, 245, 249–50 (1962) (embracing the principle of "one man, one vote"); Griswold v. Connecticut, 381 U.S. 479, 495, 506–07 (1965) (establishing a fundamental right to privacy covering the use of birth control by married couples); Reed v. Reed, 404 U.S. 71, 77 (1971) (the first case extending equal protection under the Fourteenth Amendment to gender); Roe v. Wade, 410 U.S. 113, 164, 166 (1973) (declaring that the right to privacy in reproduction encompassed the right of a woman to decide whether or not to have an abortion in the first two trimesters of her pregnancy); and of course the list goes on.

20. STASZAK, *supra* note 11, at 5.

21. *Id.* at 3 (crediting Dalia Lithwick for the Type A and B distinction); *see also* Lithwick, *Comments presented at Princeton University on Full Court Press: The Supreme Court, the Media, and Public Understanding*.

22. STASZAK, *supra* note 11, at 4.

23. *Id.* at 7.

Circuit's decision to certify the largest class action lawsuit in history. It did so on purely procedural grounds.[24] The initial plaintiff in this case was Betty Dukes, an employee of a Wal-Mart in California for seven years.[25] During her employment at Wal-Mart, Dukes was regularly passed over for raises and promotions, which instead went to male coworkers with less experience, despite her positive job performance reviews. She was not alone in her experience as a female employee at Wal-Mart. While women made up 70 percent of Wal-Mart's total employees, they represented less than a third of management and often received lower pay for doing exactly the same job.[26] Dukes maintained that Wal-Mart was violating Title VII of the Civil Rights Act of 1964, because the company fostered a nationwide corporate culture that condoned widespread workplace discrimination against women.[27] As her lawsuit developed, 1.6 million other women, who currently worked or had worked for Wal-Mart stores, joined Dukes in the lawsuit filing for certification as a class due to their shared experience of sex discrimination by the company.

This case against Wal-Mart looked a lot like major anti-discrimination class action lawsuits of the recent past.[28] Indeed, speaking of the key role of class action lawsuits in protecting civil rights of historically marginalized groups during the rights revolution, Staszak emphasizes that,

The class action lawsuit has been a long-standing vehicle for rights activism in the courts, leading to major victories aimed at rooting out discrimination in a range of different settings, from schools to police departments to corporations like AT&T, Denny's, and United Steel. Historically, class actions have proven to be a potent mechanism for changing practices related to hiring and firing, pay, workplace culture, and diversity in the workforce, and have also at times required companies to dole out large sums of back pay and damages to compensate for their discriminatory practices.[29]

However, in its 2011 *Wal-Mart* ruling, the Court refused to certify the women as a class, throwing out the case on procedural grounds without even reaching the point of considering the substantive merits of whether or not Wal-Mart discriminated based on sex.[30] Engaging in its gatekeeping function, the Court held that each woman's claim of discrimination happened at an individual level (i.e. was unique to its own specific context), rendering the claims of sex discrimination too dissimilar to meet the requirements of a single class action claim.[31] This ruling, according to Staszak, was not only "a dramatic departure from the driving motivations for creating the class action suit in the first place"—which expanded during the rights revolution to make it easier for vulnerable groups to challenge systemic concerns like workplace discrimination—but "it will no doubt also constrain the ability of similar litigants to join together in a class action" to challenge

24. Wal-Mart v. Dukes, 564 U.S. 338, 359–60 (2011).

25. STASZAK, *supra* note 11, at 16.

26. *Id.*

27. *Id.*

28. *Id.* at 91. During the civil rights revolution, legislators in the mid-1960s spearheaded several reforms, including the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure, to help "enable diverse sets of litigants to present themselves as a group in court," so that lawyers could more easily "represent them in a single case." *Id*.

29. STASZAK, *supra* note 11, at 16–17.

30. Wal-Mart v. Dukes, 564 U.S. 338, 359–60 (2011).

31. STASZAK, *supra* note 11, at 115.

systematic cases of discrimination in the future.[32] In other words, this procedural ruling—throwing out the largest class action lawsuit in history against America's biggest employer for discriminating against its female employees—is arguably just as important (if not more so) than classic landmark substantive civil rights cases. Betty Dukes—and her 1.6 million fellow plaintiffs—never got their day in court.

The 2011 *Wal-Mart* case stands out as being one of the best known recent procedural civil rights cases, yet it is merely part of a much wider trend towards judicial retrenchment in access to federal courts. As Staszak points out, the contemporary statistics involving these Type B cases are striking. Although the rates of civil rights litigation "skyrocketed in the 1950s and 1960s as landmark civil rights legislation provided new causes of action for the 'have nots' to have their day in court," the trend has radically reversed in the last twenty years.[33] In her words, "litigation rates decreased dramatically in the 1990s and 2000s," which effectively means that the doors to the courthouse are increasingly shut to vulnerable and disadvantaged individuals and groups.[34] Indeed, as Marc Galanter finds in his important article on the "vanishing trial," the percentage of federal cases that make it to trial shrank from 11.5% to only 1.8% in the forty years from 1962 to 2002, declining most precipitously by 60% from 1985 to the early 2000s.[35] Against this backdrop of the vanishing trial, Staszak seeks to shed light on the political changes and developments that led to this judicial retrenchment, whereby it has become harder and harder for disadvantaged groups to seek justice in court.[36]

In her analysis of judicial retrenchment, Staszak looks at four case studies of judicial change over time, each of which occupies its own chapter (Chapters 3-6). Her case studies are informative and detailed accounts of different avenues of procedural "subterranean" judicial change occurring within government, focusing on how these issues have developed from the 1800s to the present. First is "Changing the Decision Makers," which traces the "proliferation of alternative dispute resolution (ADR) practices that have frequently empowered nonjudicial actors to resolve legal grievances in the place of judges."[37] Second, she offers a case study on "Changing the Rules," tracing struggles over time between the three branches of national government, interest groups, and professional groups like the American Bar Association (ABA) to draft and amend the Federal Rules of Civil Procedure.[38] The struggle over rule-making focuses less on partisan ideology, on Staszak's account, and more on a power struggle between the branches of government to control the rules of the game. Her third case study, "Changing the Venue," examines the advent of the "administrative state" during the early twentieth century, and the turn towards adjudication within agencies rather than by judges in federal court.[39] Finally, in her fourth case study, "Changing the Incentives," Staszak turns to recent cases constraining

32. *Id.*

33. *Id.* at 6–7.

34. *Id.* at 7.

35. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

36. STASZAK, *supra* note 11, at 19 (discussing Galanter's findings).

37. *Id.* at 8.

38. *Id.*

39. *Id.* at 118.

the incentives for individuals to take their claims to court by focusing on doctrines restricting remedies available to individuals even if they win their case.[40] For instance, when the Court grants government officials immunity from liability, such as police officers or public school teachers—thereby restricting the availability of remedies for damages suffered by individuals even if the government violated their constitutional rights—they effectively eliminate the incentive for litigation. Without the possibility of a remedy, access to justice inevitably suffers.

Returning to the two questions mentioned earlier, Staszak provides a theory in her second chapter to explain her findings about judicial retrenchment in her four case studies. In this theory, she emphasizes that the three main variables explaining judicial retrenchment are insularity, ideology, and temporality.[41] It is important to highlight that this is not a simple theory, precisely because its purpose is to illustrate just how complicated judicial retrenchment tends to be in American politics, both past and present. In fact, she uses these three concepts to problematize and challenge our conventional wisdom about the causes and texture of judicial retrenchment. For instance, while it is conventional wisdom that judicial retrenchment is largely the result of a conservative backlash against an activist Supreme Court during the rights revolution—with the Republican Party under President Ronald Reagan in the 1980s aligning against controversial civil rights rulings, such as *Roe v. Wade* in 1973[42]—Staszak argues that the forces driving judicial retrenchment over time cannot be reduced to simple stories of "regime politics"—a popular framework for public law scholars analyzing American political development.[43] Instead, by tracing the path dependent nature of judicial retrenchment in each of her case studies in time (*temporality*), she provides an account that is complex and not reducible to mere partisanship (or *ideology* alone). Rather than focusing on dominant (ideological) regimes that seek to shape the judiciary as part of their political party ideological coalitions, her analysis directs our attention to a more complicated account of "multiple coalitions, promoting different goals and interests, which have changed over time."[44] By taking advantage of their discretion and institutional autonomy (*insularity*), various political actors seek to advance a host of different ideological and structural goals through altering the "rules of the game" pertaining to the federal judiciary with little to no threat of public backlash in this arena.[45] In this vein, Staszak argues that the explanation for judicial retrenchment rests not in the arena of "landmark" civil rights

40. *Id.* at 164.

41. STASZAK, *supra* note 11, at 34–37. Specifically, *insularity* refers to governing elites having a great deal of discretion and autonomy, or being insulated from public reproach and outside influences, to shape the rules of the game. Ideology refers to partisan and other ideological commitments of governing elites, which Staszak acknowledges sometimes explains efforts at retrenchment but emphasizes that bipartisan coalitions are frequently much more successful and responsible to these reforms. Finally, *temporality* refers to the path dependent nature of judicial retrenchment, whereby administrative procedures initially created by New Deal liberals to expand access to dispute resolution at a time in which courts were unsympathetic to civil rights and labor claims can set the groundwork for being flipped on its head to keep litigants out of court after the right revolution.

42. 410 U.S. 113, 164, 166 (1973) (declaring that the right to privacy in reproduction encompassed the right of a woman to decide whether or not to have an abortion in the first two trimesters of her pregnancy).

43. STASZAK, *supra* note 11, at 22–24 (discussing her divergence from the "regime politics" APD approach).

44. *Id.* at 6.

45. *Id.* at 34–35.

it to court in the first place, whether their case is heard, and whether they have access to a cases like *Obergefell*, but rather in the "subterranean" realm of procedural and rule reform. Although rarely the primary focus of civil rights scholars, this arena determines who makes it to court in the first place, whether their case is heard, and whether they have access to a judicial remedy.

Staszak's thoughtful book makes a number of important contributions to the literature on law and courts and American political development (APD).[46] By viewing judicial retrenchment through the APD lens of historical change, Staszak is able to reveal a much more nuanced and path dependent account of procedural evolution, which pinpoints fallacies in our contemporary assumptions about the origins and causes of retrenchment. Moreover, while public law scholars often sideline procedural issues in favor of focusing on more substantive civil rights, Staszak does an excellent job shedding light on the importance of procedure in civil rights rulings. Her historical institutionalist approach is nuanced and informative, and her theory (of insularity, ideology, and temporarily) helps explain her empirical findings in a manner that persuasively challenges conventional wisdom.

Despite these overwhelming strengths, Staszak's book at times seems to miss the forest for the trees by intentionally seeking out complexity rather than searching for common patterns over time. There are both advantages and disadvantages to this approach, but one downside is that she goes to great lengths to highlight the contingent aspects of judicial retrenchment at the expense of drawing attention to the work of partisan regimes. Given that her own evidence confirms a broader pattern of conservative backlash against the rights revolution in the last twenty-five years, this drives her to minimize a particularly important explanatory pattern. Nonetheless, Staszak convincingly makes the case that *procedure* matters at least as much as *substance* when it comes to civil rights litigation. Her focus on elite top-down judicial retrenchment raises serious concerns about the future of access to justice and shines a light on a stealth assault on civil rights in America today.

STEALTH ADVOCACY FOR CIVIL RIGHTS: BOTTOM-UP CIVIL RIGHTS CAMPAIGNS

In *Below the Radar: How Silence Can Save Civil Rights,* Alison Gash presents a bottom-up account of low-visibility civil rights tactics pursued by vulnerable groups seeking to secure equal status in American society.[47] Both books under review share a core theme of examining low-visibility tactics within the realm of civil rights and the judiciary. But while Staszak addresses the role that elites play in hindering civil rights through subterranean tactics of judicial retrenchment, Gash argues that subterranean tactics can also be used to advance civil rights. She offers a fascinating twist on low-visibility judicial policy-making, suggesting that this strategy can serve as an effective political tool for vulnerable groups and thus (as her title suggests) might even "save" civil rights in America.

Gash, like Staszak, identifies the "rights revolution" as a benchmark for considering

46. For a general introduction to the APD literature, see KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004).

47. *See* GASH, *supra* note 10.

the relationship between visibility and civil rights in contemporary America.[48] After the judicial successes of the rights revolution, conventional wisdom has normalized 'a politics of visibility' as a vital ingredient for civil rights advocacy. For instance, through high-visibility court cases and public protest, marginalized groups, including African Americans and women, were able to spark a national debate about their place in society, win over public opinion, and alter both statutory law and constitutional interpretation over time.[49] On the benefits of visibility, Gash writes:

Visibility can help plant an issue firmly on the legislative agenda or open windows for a policy dialogue among parties who would otherwise remain disinterested or uninvolved. It can lend a human face to an issue or population plagued by stereotypes and misperceptions.[50]

Despite the importance of visibility for those hoping to change the status quo, she emphasizes that high-visibility litigation strategies are also dangerous for vulnerable minority groups, fighting an uphill battle in a society in which they are unequal, unpopular, and often stigmatized by the majority. This is why unpopular minorities tend to seek remedies in court, rather than at the ballot box. But since courts have neither the power of the sword nor the purse, to paraphrase Alexander Hamilton's classic argument about the weakness of the judiciary in Federalist No. 78,[51] even a favorable ruling from a judge can buckle under counter-mobilization from a hostile majority taking advantage of the broader electoral process in our political system marked by "institutional pluralism."[52] As Gash puts it, "[t]his book starts from the premise that minority rights advocacy, regardless of venue or tactics, is always vulnerable to opposition or backlash."[53] By challenging the status quo, minorities risk stirring up majority opposition and losing ground.

A wide range of studies support Gash's concern about backlash. Perhaps the best-known work on the topic is Gerald Rosenberg's influential 1991 book (*The Hollow Hope: Can Court's Bring about Social Change?*), in which Rosenberg argues that landmark civil rights cases—most notably, *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973)—were in many ways counterproductive because they provoked public backlash that harmed the very groups and causes they purported to assist, spurring "white flight" in the face of racial integration in public schools and politically mobilizing the Christian right against abortion.[54] Importantly, in contrast to Rosenberg, Gash takes the dangers of backlash seriously without discounting the utility of high-visibility tactics to win landmark victories through (usually bruising) battles. Her point is not that high-visibility tactics lack efficacy when it comes to achieving social change—here she clearly diverges from Rosenberg by emphasizing the importance of visibility for marginalized groups seeking to spark a national conversation and potentially win over public opinion. Rather, she highlights the risks associated with visibility and, most importantly, she argues that there

48. *Id.* at 12–23.

49. *Id.* at 13–14.

50. *Id.* at 14.

51. THE FEDERALIST No. 78 (Alexander Hamilton).

52. GASH, *supra* note 10, at 12, 204–05 (discussing her concept of "institutional pluralism").

53. *Id.* at 18.

54. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1st ed. 1991).

are times in which low-visibility tactics are a more effective means to achieve a favorable outcome. Gash maintains that the threat of public backlash makes below-the-radar strategies a vital, yet widely overlooked, strategy available to social movements. As she puts it, "This project focuses on instances where, instead of advancing the privileged, low-visibility tactics are used to promote reform efforts on behalf of disenfranchised communities that are among the most vulnerable."[55]

To support her thesis, Gash offers two interesting case studies of groups using *both* high-visibility and low-visibility tactics in similar policy arenas. This enables her to evaluate the efficacy of each approach to visibility. The first compares struggles for same-sex marriage, which resulted in massive public backlash and setbacks for over two decades, to the much more successful and less publicized below-the-radar tactics for LGBT parenting equality during the same period. The second focuses on efforts to establish group homes for people with disabilities or recovering from addictions under the threat of local NIMBY (Not in My Back Yard) neighborhood backlash, comparing the success rates of low and high visibility tactics. Each case study is compelling and informative. Gash supports her analysis of grassroots organizing and litigation strategies with interviews of advocates and judges. She also examines public opinion polls and media coverage to gauge popular awareness and support/opposition of these efforts. For the purposes of this review, I focus on her study of parenting equality, because it begins with a compelling puzzle, which connects to the opening "big politics" case of *Obergefell* (2015). In particular, Gash compares the twenty years of devastating losses and bruising battles over same-sex marriage, which changed tide only recently, to favorable court rulings supporting lesbian and gay parenting, which happened during the same time as the explosive backlash against marriage.[56] As she frames this puzzle: Given that gay and lesbian parenting directly challenges the anti-gay family values agenda at least as much as marriage, "How can we explain these two contemporaneous and yet divergent responses to same-sex family litigation?"[57]

Gash's answer highlights different approaches to visibility.[58] The same-sex marriage movement followed the familiar path of high-visibility litigation sparking public backlash, but the parenting movement did not. Although we now know that the same-sex marriage story has a happy ending, Gash emphasizes that "the politics of same-sex marriage have been as volatile as they are visible."[59] All the state Supreme Court of Hawaii had to do was "venture[] toward legalizing marriage equality for same sex- couples" in *Baehr v. Lewin* decision in 1993,[60] and the issue of same-sex marriage became one of the most controversial hot-button issues in the late twentieth and early twenty-first century.[61]

55. GASH, *supra* note 10, at 15.

56. *Id.* at 2–3.

57. *Id.* at 3.

58. *Id.* at 104–09. In defense of low-visibility, Gash shows that Public opinion cannot explain these divergent outcomes. According to opinion polls, the public was equally opposed to both same-sex marriage and lesbians and gay men parenting. And one of the most prominent arguments against same-sex marriage was that it would legitimize lesbian and gay parenting, suggesting that the opposition to marriage was rooted in the aim of preventing "homosexuals" from raising children. *Id.*

59. *Id.* at 52.

60. GASH, *supra* note 10, at 2 (discussing Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)).

61. *Id.* at 60.

Responding to massive conservative backlash against *Baehr*, Congress passed, and President Bill Clinton signed the federal Defense of Marriage Act (DOMA) in 1996, limiting marriage to heterosexual couples federally and allowing states to refuse to recognize same-sex marriages performed in other states.[62] Furthermore, between 1996 and 2006, after Massachusetts granted same-sex couples the right to marry in *Goodridge v. Department of Public Health*,[63] "same-sex marriage had been banned either by statute or constitutional amendment in more than forty states."[64] Yet in the shadow of the fury over marriage equality, Gash draws our attention to an "equally significant," but "much less publicly contested" set of decisions validating same-sex families and parenting.[65] During the same period of time, in a series of below-the-radar cases across the country within local family courts, lesbian and gay parents were regularly granted custody of their biological children and able to adopt despite their homosexuality.

This brings us to Gash's main point. Whereas marriage litigation was unavoidably visible, Gash notes that parenting litigation was structurally and strategically different: "in many ways the issue of same sex parenting lends itself to (or even calls for) low visibility advocacy" and this "was critical to its success."[66] The first wave of LGBT parenting litigation involved homosexual biological parents (mostly mothers) fighting divorcing spouses in family court to retain custody of their children.[67] Given the risk of potentially losing custody of their children, the parenting movement deliberately developed "specific below-the-radar strategies to avoid any publicity that would thwart their progress."[68] Since the cases arose in local family courts, they were handled on a case-by-case manner and records were usually sealed from the public. Attorneys urged judges to focus on their client's parenting skills (not their homosexuality), and grounded legal arguments on traditional heterosexual statutory law, which emphasized "the best interests of the child."[69] When the next phase of the parenting movement turned to adoption in the 1980s, "advocates stuck to the…incremental, low-visibility approach employed in early parenting cases involving homosexual parents."[70] Prominent national gay rights advocacy organizations supported litigation efforts from behind-the-scenes. They were careful to remove their names from briefs and to avoid making fancy new rights claims that could spur public opposition. Lawyers sought to educate judges about the issue and brought cases to judges who indicated they were sympathetic.[71] They steered clear of politicizing decisions and intentionally did not challenge them in higher appellate court.[72] Keeping a low-profile, activists engaged in nationwide sharing of tactics by word of mouth, seeking

62. *Id.* at 62 (discussing Defense of Marriage Act of 1996, Pub. L. No. 104–99, 110 Stat. 2419, later partially invalidated by the Supreme Court in United States v. Windsor, 570 U.S. 744 (2013)).

63. 798 N.E.2d 941 (Mass 2003).

64. GASH, *supra* note 10, at 66–67.

65. *Id.* at 2.

66. *Id.* at 110, 111.

67. *Id.* at 99.

68. *Id.* at 110.

69. GASH, *supra* note 10, at 98–102.

70. *Id.* at 102.

71. *Id.* at 112–17.

72. *Id.* at 115, 120.

to "incrementally develop positive precedent without politicizing their efforts."[73] With low levels of public engagement or opposition, the parenting movement outpaced the marriage movement, and Gash persuasively argue that its success hinged on staying largely outside the public eye.

This is an important book. In documenting examples of activists using stealth tactics to achieve major victories outside the public eye, Gash makes a novel contribution to the literature on civil rights, public policy, and social movements more broadly. Her evidence is persuasive, and her case studies of "stealth" civil rights tactics are nuanced and engaging. While scholarly debate over the efficacy of civil rights litigation tends to focus almost exclusively on the risks and benefits of conventional (visible) methods of litigation, Gash argues that there is another less visible way for civil rights to advance, which includes incremental "below the radar" litigation strategies in local and civil courtrooms. In this regard, Gash draws our attention to what we, as scholars of law and politics, have known but often tend to forget or overlook (in the name of the allure of "big politics"): Social movements are hard work.[74] High-profile Supreme Court victories like *Brown v. Board of Education* (1954) are covered in history books, but it is the multiplicity of strategies, venues, activism, and protest that together pave the way towards to social change. The African American Civil Rights Movement depended upon decades (arguably centuries) of small, frequently low-visibility, acts of civil disobedience and local heroism, in addition to both low-visibility and high-visibility organizing by civil rights organizations like the NAACP and leaders like Dr. Martin Luther King, Jr.[75] There is a sense in which the narrative of high-profile litigation—which has become conventional wisdom in the aftermath of the rights revolution—distracts us from the mundane, painful, and time-consuming reality of the behind-the-scenes activism driving these movements.

The recent success of the same-sex marriage movement strongly supports this point. Although Gash wrote this book before *Obergefell* in 2015, the landmark ruling bolsters her thesis by revealing a vital political connection between the same-sex parenting and marriage movements. During the two decades of public backlash against gay marriage, the most popular argument defending federal and state bans against same-sex marriage rested on the premise that heterosexuals were more suitable parents than homosexuals. However, as Gash emphasizes, decades of behind the scenes victories in local family courts across the country meant that same-sex parents had legally adopted thousands upon thousands of children, functioning as formal family units. By changing the facts on the ground, this pulled the rug out from under the opposition. Consider Justice Kennedy's discussion of same-sex families in the majority opinion in *Obergefell*:

> [M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted . . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated

73. *Id.* at 111.

74. *See* SYDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (3d ed. 2011).

75. *See* ALDON D. MORIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZAING FOR CHANGE (1986); DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970 (2d ed. 1999).

> through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same sex couples.[76]

As Justice Kennedy emphasizes in *Obergefell*, the parenting movement had already altered the legal rules and social norms defining the American family. The incremental (behind-the-scenes) work of the parenting movement helped pave the way for this future same-sex marriage victory, suggesting that low and high visibility strategies can work together to achieve major victories in the court.

Gash's major contribution to the literature is to remind us about the less glamorous, yet politically just as important, below-the-radar strategies used by civil rights advocates seeking to advance the status of vulnerable minorities in America today. However, while Gash offers a superb analysis of two case studies of social movements pursuing low-visibility strategies to bring about social change, I would have liked to see her address the way in which low and high visibility strategies interact in greater detail. Gash mentions that low and high visibility tactics can and often do work together in complementary fashion (a point captured above in my discussion of *Obergefell*), but in what ways does this happen within a broader social movement? When do advocates for civil rights intentionally pursue low-visibility tactics? Are certain issues better suited to benefit from low-visibility tactics? If so, what features determine this and why? Gash offers two excellent examples of below-the-radar strategies advancing the rights of LGBT parents and group homes for people with disabilities, but by identifying this oft-overlooked phenomenon, she raises as many questions as she answers. The exciting news is that she opens doors for future scholarship in this area, which is an indication of the impressive breadth and achievement of this book.

CONCLUSION

I opened this review with *Obergefell v. Hodges* (2015) because this recent Supreme Court case sparked renewed discussion about the "rights revolution" and American society. But, as Staszak and Gash persuasively demonstrate, focusing our attention (disproportionately) on blockbuster cases like *Obergefell* leaves out a vital dimension of the politics of civil rights today. The two books both address an important issue from different angles: What is the relationship between visibility and civil rights? In doing so, they assume that litigation can contribute to meaningful social change, but also challenge the assumption that the primary or sole way of doing so is through high visibility litigation. By highlighting the subterranean realm of civil rights and challenging traditional assumptions about the role of visibility in rights litigation associated with the rights revolution, these books remind us that the power of rights is about what they do, as a practical matter, rather than their symbolic allure.[77] Importantly, while each author examines stealth battles over civil rights from a radically different angle, there is nothing fundamentally inconsistent about these two studies; with Staszak focusing on elites in government undermining access to courts (from above) and Gash examining grassroots activists advancing the rights of vulnerable groups (from below). In different ways and

76. Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).

77. *See, e.g.*, STUART A. SHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed., 1974).

using different research methods, both Gash and Staszak argue that—despite the brute reality that politics today is dominated by "hyper-visibility" and "big political events"—the subterranean politics of rights can be just as important as blockbuster cases. These books are timely reminders of a more complex landscape shaping the politics of civil rights advocacy during a time in which many vulnerable minority groups are facing renewed backlash under "Trumpian populism." Moving forward, scholars and advocates alike would be wise to take the subterranean politics of civil rights seriously in their judicial efforts to bring about meaningful social change for vulnerable groups in America.