

# Making Sense of the Marriage Debate

FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE. By Michael J. Klarman. New York, New York: Oxford University Press, 2013. 276 pages. \$27.95.

Reviewed by Jane S. Schacter\*

When are courts justified in trumping a majority's will? Can countermajoritarian decisions produce meaningful social change? Which minority groups command special judicial protection from the depredations of the majority? These are classic questions of constitutional law and theory and have shaped the scholarly literature for two generations. The ongoing movement for marriage equality features all of these questions and has, since its inception in the early 1990s, spawned a national debate about the role of courts.

Michael Klarman's *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*<sup>1</sup> comprehensively traces the marriage debate with a special eye on the role of courts in propelling it. Among its many gifts is that of exquisite timing. The book was published only a few months before the Supreme Court announced in late 2012 that it would hear constitutional challenges to the federal Defense of Marriage Act and to California's Proposition 8.<sup>2</sup> If the marriage debate were a symphony whose first movement began with an unexpected Hawaii decision in 1993,<sup>3</sup> one might say that the Supreme Court's twin grants of certiorari in these cases foreshadowed a crescendo of sorts. Or maybe not. In fact, as the book reflects, the Supreme Court will enter this debate after some twenty years of groundbreaking litigation around the country,<sup>4</sup> noisy debates in state and federal legislative chambers,<sup>5</sup> and scores of hotly contested ballot measures.<sup>6</sup> What the Supreme Court decides to do will be significant and highly watched. But one of the points the book communicates so effectively is that

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\* William Nelson Cromwell Professor of Law, Stanford Law School.

1. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013).

2. *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012); Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES, Dec. 7, 2012, [http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html?ref=adamliptak&\\_r=0](http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html?ref=adamliptak&_r=0).

3. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); KLARMAN, *supra* note 1, at 48–60.

4. KLARMAN, *supra* note 1, at 48–89, 90–91.

5. *Id.* at 108–09, 143–55.

6. *Id.* at 65–66, 84, 112, 120–26, 144–46, 193.

the trajectory of public opinion strongly favors marriage equality, with young people vastly more supportive than older citizens.<sup>7</sup> The proverbial writing seems to be on the wall. Thus, the Court's first foray into this national debate may well tell us more about how the justices want their role in it to be remembered than it does about how the issue will be substantively settled in American society.

Klarman's book will, in any event, equip its readers to reflect thoughtfully about whatever the Court decides to do. The book sets the stage for the Court's action by offering a readable history, in chapter and verse, of the developments that have shaped the marriage equality movement. Klarman closely follows the legal trajectory from the 1993 Hawaii decision that made same-sex marriage appear imminent,<sup>8</sup> through the 2003 Massachusetts decision that actually legalized same-sex marriage for the first time in the United States,<sup>9</sup> through many other state court decisions, as well as the more recent federal cases. But this history goes far beyond any narrow charting of judicial decisions or doctrinal developments. Klarman also closely explores the fierce backlash around the country in the form of dozens of anti-same-sex-marriage measures on the state and federal level,<sup>10</sup> as well as the political context that shaped this backlash.<sup>11</sup> Throughout, he deftly explores the key dynamics in the social, political, and cultural environment that have both fueled and thwarted the claim in favor of same-sex marriage. For those who have pressed for marriage equality, this history has been full of soaring victories and bruising defeats, along with plenty of political mobilization and countermobilization. But through it all, there has been a steady growth of public support<sup>12</sup> for what was once seen as the marginal and socially implausible idea of state-recognized same-sex marriage.

The book sets out not only to tell, but to understand, this deeply mixed history and to consider what lessons we might draw from it. In this review, I first assess Klarman's rendering of the story and the conclusions he reaches. I then consider what the story he tells might suggest about some enduring questions in American constitutional law and scholarship.

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About two-thirds of the book tells the story of the movement for marriage equality. The remaining third reflects on the causes and implications of the backlash against the equalizing efforts of courts. The

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7. *Id.* at 199–200, 218.

8. *Id.* at 57–60.

9. *Id.* at 90–93.

10. *Id.* at 26–29, 68, 80–83, 95–98, 144–46, 175–76.

11. *Id.* at 31–36, 60–63.

12. *Id.* at 105–06, 135–37, 161, 166–69, 178–98; see also Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx> (discussing the results of a Gallup poll conducted in November 2012 showing that a majority of young Americans support same-sex marriage).

careful historical chapters are fascinating in their own right, and also set the stage for the later reflections on the role played by litigation.

The principal historical narrative stretches from the 1950s and 1960s to mid-2011, when the New York legislature enacted marriage-equality legislation.<sup>13</sup> The radically disparate periods that bookend the historical portion of the book speak volumes about one of Klarman's principal themes: the enormous and ongoing social change in the LGBT-rights<sup>14</sup> arena. In the time period addressed in Chapter 1, every state criminalized consensual sexual activity between partners of the same gender, the medical profession saw homosexuality as a disease, and even the ACLU saw no problems criminalizing behavior that it called "socially heretical or deviant."<sup>15</sup> Early attempts to protest or organize against a pervasively repressive status quo were fraught with danger.<sup>16</sup> The contrast with 2011 could hardly be starker. When New York enacted its marriage legislation with the enthusiastic support of Governor Andrew Cuomo, not only did it join five other states and the District of Columbia in offering full marriage equality, but an additional twelve states offered civil union or domestic partnership protection, twenty-one states had added sexual orientation to their antidiscrimination statutes, the Supreme Court had ruled bans on consensual sodomy unconstitutional, and it had become common for LGBT persons to come out and to be widely featured in popular culture, to name just a few developments of note.<sup>17</sup>

Klarman's first eight chapters touch on many of the key developments—large and small—that put such a great distance between the 1950s and 2011. None are bigger for his story of the marriage-equality movement than the 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*.<sup>18</sup> *Baehr* was a case that LGBT-rights litigators had declined to bring, fearing that it was premature.<sup>19</sup> It was brought by a private attorney.<sup>20</sup> Much to the surprise of virtually all observers, the decision held that the Hawaii Constitution mandated the application of strict scrutiny to the state's traditional marriage laws—making it highly likely that the state law restricting marriage to a man and a woman would be found unconstitutional.<sup>21</sup> The specter of same-sex couples getting married in

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13. *Id.* at 163–64.

14. I will use the inclusive term "LGBT" (lesbian, gay, bisexual, and transgender), though the issues relating to bisexuality and transgender do not figure much in the book.

15. *Id.* at 3–6.

16. *Id.* at 7.

17. *Id.* at 163–64; see also *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, Dec. 30, 2012, [http://topics.nytimes.com/top/reference/timestopics/subjects/s/same\\_sex\\_marriage/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html) (providing an overview of recent legal, political, and public opinion changes with regard to same-sex marriage).

18. 852 P.2d 44 (Haw. 1993).

19. KLARMAN, *supra* note 1, at 55.

20. *Id.*

21. *Id.* at 56.

Hawaii and seeking recognition in other states was the big bang, as it were, of a debate that has been roiling ever since. As Klarman and others have noted, soon after *Baehr*, LGBT-rights litigators felt they had little choice but to hop on a train that they themselves had not thought ready to leave the station.<sup>22</sup>

While history will record 1993 as the key start date, Klarman's narrative reflects that it was, in fact, only a few years after the Stonewall uprising kicked off the modern gay-rights movement in 1969 that the first marriage-equality lawsuits were launched.<sup>23</sup> They were not taken terribly seriously, though it was, interestingly, one of these early suits—pressed by two gay students at the University of Minnesota who had unsuccessfully sought a marriage license—that led to the Supreme Court's summary affirmance in *Baker v. Nelson*.<sup>24</sup> That ruling has regularly shown up in briefs opposing marriage equality.<sup>25</sup> It seems unlikely the justices deciding the pending *Windsor*<sup>26</sup> and *Perry*<sup>27</sup> cases will be too concerned with a forty-year-old summary affirmance issued before any of the contemporary gay-rights cases in constitutional law, but it will surely be enlisted for support by those defending DOMA and Prop 8.

Much of the story Klarman tells will be familiar to students of the LGBT-rights movement. Indeed, because a lot of it is very recent and has been the subject of extensive media coverage, some will be familiar even to those who have not immersed themselves in the history of LGBT rights. Still, the history is quite well told and is synthesized in ways likely to engage a general audience. One might wish that Klarman had devoted more

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22. *Id.* at 55; see also Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1245 (2010) (explaining that LGBT lawyers “did not affirmatively pursue litigation to achieve the right to marry in Hawaii,” but instead joined the *Baehr* effort after the fact to help shape legal strategy); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1165–66 (2009) [hereinafter Schacter, *Politics of Backlash*] (discussing how the major gay-rights litigators refused to take on the *Baehr* action, believing it to be premature).

23. See Schacter, *Politics of Backlash*, *supra* note 22, at 1165 (explaining that neither *Goodridge* nor *Baehr* was the first lawsuit to challenge different-sex-only marriage and pointing to early test cases in Kentucky, Minnesota, and Washington that the government won). See generally *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (affirming the lower court's refusal to issue a marriage license to a same-sex couple); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (holding that Minnesota law limited marriage to different-sex couples, which did not violate the United States Constitution), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the statutory prohibition on same-sex marriage did not violate state or federal constitutional rights).

24. 191 N.W.2d 185 (Minn. 1971).

25. *E.g.*, Defendant-Intervenors-Appellants' Opening Brief 32 n.7, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 11-16577), 2011 WL 6117216, at \*32 n.7, *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). For a recent decision accepting defense arguments that *Baker* should be accorded precedential effect, see *Jackson v. Abercrombie*, No. 11-00734, 2012 U.S. Dist. LEXIS 111376, at \*45–51 (D. Haw. Aug. 8, 2012).

26. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

27. *Hollingsworth*, 133 S. Ct. 786.

attention to certain stories that profoundly capture the kinds of personal struggles that happen when the way people live is not matched by an available legal infrastructure. For example, Klarman only briefly touches on the stories of two women—both, coincidentally, named Sharon—who became iconic within the LGBT community as their legal battles unfolded in the 1980s and '90s.<sup>28</sup> Sharon Kowalski was in a disabling auto accident in 1983, and her longtime partner was shut out of her life for years by Sharon's family of origin.<sup>29</sup> Ultimately, a court allowed Sharon to choose her own guardian and she chose her partner.<sup>30</sup> In 1993, in Virginia, Sharon Bottoms lost custody of her son Tyler to her own mother after Sharon came out as a lesbian and her mother alleged she was an unfit parent.<sup>31</sup> In this instance, the courts did not rule in her favor.<sup>32</sup> Much more could have been said about both, though, in fairness to Klarman, he does not purport to offer a detailed exposition of all important LGBT legal battles.

Klarman also weaves into his narrative some information that is less widely known. Three examples of such stories are illustrative, and each ties to a larger theme that characterizes the movement for marriage equality. One example is when Klarman tells of an early attempt by an unnamed male couple to secure a same-sex marriage license in Colorado in 1975.<sup>33</sup> After receiving advice from a local district attorney that the state marriage law did not clearly outlaw same-sex marriage, a county clerk granted licenses to this couple and a few others.<sup>34</sup> About a month later, the state Attorney General shut down the clerk by issuing an opinion that same-sex marriage was prohibited.<sup>35</sup> While this episode of on-the-ground activism garnered some publicity and seems to have exposed the couples to some hostile reactions, its relatively modest public profile contrasts starkly with the climate over the last two decades. In that more recent climate—one in which the internet has turbocharged the flow of information—all things same-sex marriage have been a magnet for media attention and have quickly become part of a polarized national political debate.<sup>36</sup>

A second example sheds some light on precisely the absence of a polarized national political debate in the 1970s. Klarman explores the role of

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28. KLARMAN, *supra* note 1, at 50–51.

29. *Id.* at 50.

30. *Id.*

31. *Id.* at 51.

32. *Id.* at 50–51.

33. *Id.* at 20–21.

34. *Id.* at 21.

35. *Id.*

36. Indeed, Richard Adams, one of the men seeking to get a marriage license in Colorado recently died, and the New York Times published an obituary. Margalit Fox, *Richard Adams, Same-Sex Spouse Who Sued U.S., Dies at 65*, N.Y. TIMES, Dec. 24, 2012, [https://www.nytimes.com/2012/12/25/us/richard-adams-who-sued-us-after-1975-gay-marriage-dies-at-65.html?\\_r=0](https://www.nytimes.com/2012/12/25/us/richard-adams-who-sued-us-after-1975-gay-marriage-dies-at-65.html?_r=0). One wonders if his death would have drawn the same public notice in the absence of the high-profile contemporary marriage debate.

LGBT issues in helping to propel the rise of the religious right in the late 1970s and early 1980s. He notes that the first-ever advertisement on gay issues to run in a presidential campaign was offered up by a group called “Christians for Reagan” in the 1980 election.<sup>37</sup> Whereas President Carter had carried evangelical voters in 1976, Klarman notes, Reagan won them by a two-to-one margin in 1980.<sup>38</sup> Reagan’s election has proven to be something of a prototype for what has now become utterly routine and familiar: the close intersection of LGBT and other social issues with electoral politics, and a steady and predictable partisan alignment. That linkage has played a big role in the marriage debate. By 1993, when *Baehr* was decided, the forces who would oppose same-sex marriage had long since mobilized against LGBT rights and made themselves a vocal part of national politics. That political organization helped to shape—and quickly nationalize—the backlash by positioning cultural conservatives to respond quickly to developments like the surprise ruling in Hawaii.<sup>39</sup>

A third example relates to another main theme in the book: the veritable chasm of an age divide in the general public on the same-sex marriage issue.<sup>40</sup> Klarman emphasizes the pronounced difference in support for same-sex marriage, as between older and younger segments of the electorate.<sup>41</sup> At one point, though, he probes an interesting variant of this phenomenon with poll data reflecting a pronounced age effect even *within* the LGBT community. In 2003, 18-year-old gay respondents were 31% more likely to support same-sex marriage than 65-year-old gay respondents.<sup>42</sup> Generational differences in this context suggest a change in both expectations and priorities in the LGBT community.

All in all, Klarman’s telling of the story is well done in the way it weaves together the interacting legal, political, social, and cultural forces, and connects small details to larger developments. He makes clear, moreover, that while the same-sex marriage movement began with a Hawaii lawsuit, its dynamics have ranged far beyond the judicial domain and have proven quite complex.

Having said that, though, there are places where assertions are made that seem puzzling or unpersuasive. For example, in the course of introducing the debate over same-sex marriage, Klarman observes that the “[a]rguments for and against gay marriage have not changed much over the past two decades.”<sup>43</sup> While he may be correct that some core concepts have

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37. KLARMAN, *supra* note 1, at 33.

38. *Id.*

39. *See id.* at 55–57 (chronicling the circumstances leading up to and the backlash against the Hawaii ruling).

40. *Id.* at 199–200.

41. *Id.*

42. *Id.* at 51.

43. *Id.* at 52.

persisted through these years—say, the much debated link between procreation and marriage—in fact, opponents of marriage equality have markedly refined and moderated their arguments over the years. For example, whereas the congressional debates about DOMA in 1995 featured plenty of references to “perversion” and “lust,” the campaign for Prop 8 in 2008 stayed studiously away from such incendiary rhetoric and focused, instead, on claims about what children would have to be taught in schools.<sup>44</sup> The perceived strategic advantage in toning down arguments is a point worth pausing to note because it captures the dynamic nature of the debate, and corresponds to the rise in pro-gay public opinion that Klarman makes a central point of his analysis.

A more significant issue in the book, though, is with some problematic claims of cause and effect. At one point, for example, Klarman suggests that some wondered if the rash of pro-marriage-equality developments in what he calls the “gay marriage spring” of 2009 would affect the California Supreme Court justices deliberating on a state constitutional challenge to Prop 8.<sup>45</sup> Having raised that possibility, he then concludes that the developments did not, in fact, influence them.<sup>46</sup> He reaches that conclusion, presumably, because the state supreme court went on to uphold Prop 8.<sup>47</sup> But it is only a very narrow concept of “influence” that would reason to that conclusion from the outcome of the case. It could well be that the justices *were* influenced, but in the other direction. That is, it is plausible that they were influenced to turn down the challenge because they could see the trajectory of public opinion and were less inclined to believe that judicial intervention would be necessary to overturn Prop 8. In any event, the question of how outside developments actually “influence” judges is a difficult one to study. Even assuming that judges themselves could correctly identify what influences their decisions, they are not likely to recite or reveal it.

Consider another example: Klarman’s treatment of the marriages performed in 2004 in San Francisco, as directed by then-Mayor Gavin Newsom.<sup>48</sup> Newsom acted without legal authority, and the marriages he permitted were later declared invalid.<sup>49</sup> There is no question that, as ably described by Klarman, the Newsom weddings were quite controversial, and

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44. On the changes since the DOMA debate, see Ariane De Vogue, *Congress Evolves on DOMA, Same-Sex Marriage*, ABC NEWS (Dec. 6, 2012), <http://abcnews.go.com/Politics/congress-evolves-doma-sex-marriage/story?id=17888075#.UNYwnHdU3>. On the character of the arguments stressed in the Prop 8 campaign, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 366–67 (2009) (characterizing Prop 8 proponents’ campaign as presenting their position less as “homophobia and discrimination” and more as “reasonable dissent”).

45. KLARMAN, *supra* note 1, at 119, 134.

46. *Id.* at 134.

47. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

48. KLARMAN, *supra* note 1, at 189–90.

49. *See id.* at 99 (“Newsom’s action was largely symbolic, as experts were certain that the state would not recognize such licenses.”).

many thought they were counterproductive. But it is puzzling for Klarman to assert, without any obvious way to prove it, that the rogue weddings in San Francisco (as well as similar weddings in Oregon) “more than the *Goodridge* decision that inspired them, ignited the powerful political backlash of 2004.”<sup>50</sup> That statement begs any number of questions—how could one know which action caused more backlash, or make fine calibrations, given that they took place within months of each other? How could or would one test this proposition? The facts, cited by Klarman, that legislators like Barney Frank and Dianne Feinstein lamented what Newsom did, that opponents of marriage equality thought it helped them, and that Karl Rove seemed to feel that President Bush derived political benefit from it,<sup>51</sup> do not supply that proof.

At one point, Klarman speculates that these weddings backfired because observers had a “visceral[ly]” negative reaction to seeing the celebrating couples.<sup>52</sup> That is plausible and, for some who watched the coverage, likely to be true. But the suggestion is in some tension with the point stressed elsewhere that a key dynamic in boosting public support for gay rights has been the increased visibility of gay people. Klarman explicitly discusses the proliferation of gay television characters in the 1990s, as well as the effect of more gay people coming out to friends, family, and others.<sup>53</sup> It is, then, unclear how particular images of weddings would be in a totally different category. To the extent the backlash he associates with the west-coast weddings involves couples kissing, in particular, perhaps there is a distinguishing characteristic there.<sup>54</sup> But, of course, not all couples on line to get married kissed one another, not all who saw those images would have reacted the same way, and—in general—the proof remains elusive.

None of these individual points is overwhelmingly important, and the point is not to nitpick. The point is, instead, to notice that it is difficult to make confident assessments of causation when there are so many complex dynamics in play, and so many different individuals and subcommunities taking it all in. The scholarly impulse to reach causal conclusions is understandable, but the facts are often too messy to warrant sure conclusions.

Indeed, one of the most salutary aspects of the book is that, on the large issue of assessing backlash, Klarman demonstrates an admirable ability to capture this messiness. In fact, this is a significant way in which the book compares favorably with Klarman’s own earlier work on same-sex marriage

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50. *Id.* at 192; *cf. id.* at 189 (arguing that these weddings “early in 2004 generated at least as much backlash against gay marriage as had *Goodridge* itself”).

51. *Id.* at 192.

52. *Id.* at 175.

53. *Id.* at 73.

54. *Id.* at 175–76.



and backlash. In a 2005 article, he compared *Brown*,<sup>55</sup> *Lawrence*,<sup>56</sup> and *Goodridge*<sup>57</sup> as he explored what causes antijudicial backlash.<sup>58</sup> There, he offered up discrete criteria for predicting backlash and made stronger, more categorical pronouncements about the negative effects of launching litigation before public opinion is sufficiently supportive.<sup>59</sup> His proffered criteria looked to whether a court ruling made an issue more salient, generated anger over “outsider interference” or “judicial activism,” and pursued social change in a different order than what majoritarian institutions would do.<sup>60</sup> He argued in 2005 that *Goodridge* fit these criteria, as did the Supreme Court’s decision in *Lawrence*, which became more controversial than might otherwise have been the case because its invalidation of sodomy laws was assessed as part of the ongoing controversy about marriage.<sup>61</sup> His conclusion in the article was summed up as: “By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.”<sup>62</sup> In the course of this argument, he attributed to *Goodridge* several consequences that undermined LGBT interests—not only the enactment of many anti-same-sex-marriage measures, but possibly delivering the 2004 election to George Bush; providing the margin of difference to several Republican Senate candidates in close races and thus making it more difficult for LGBT-supportive Democrats to block the appointment of conservative federal judges; and giving cultural conservatives an enduring political issue to use to great effect.<sup>63</sup>

Although Klarman covers much of the same ground in the book and alludes to the same factors in explaining the backlash, there is a noticeable change of tone and conclusion from the earlier article. In the book, Klarman is much less committed to a negative assessment of litigating for same-sex marriage at a time when public opinion was not supportive. Indeed, having explored both the costs and benefits of litigation, he concludes in the book that, “[o]n balance, litigation has probably advanced the cause of gay marriage more than it has retarded it.”<sup>64</sup> And, to a much greater degree than he did in his earlier work, Klarman recognizes that “[l]itigation put gay marriage on the table,” and that, had early litigation not made marriage

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55. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

56. *Lawrence v. Texas*, 539 U.S. 558 (2003).

57. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

58. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

59. *Id.* at 473.

60. *Id.*

61. *See id.* at 459–73 (discussing backlash against *Goodridge*); *see also id.* at 459 (connecting adverse reaction to *Lawrence* to the marriage debate).

62. *Id.* at 482.

63. *Id.* at 459–73.

64. KLARMAN, *supra* note 1, at 218. Here, he lists the costs as impeding progress on other gay-rights priorities, causing Senate candidates to lose reelection and state judges to lose their positions, and perhaps affecting the outcome of the 2004 election, which in turn led to a more conservative court. *Id.* at 218–19.

salient, it is “unlikely that more than 50 percent of Americans would support gay marriage in 2012.”<sup>65</sup> To his credit, Klarman notes expressly in the book that some of his views have changed.<sup>66</sup> Klarman is not alone in having perspectives on the marriage controversy that have “evolved,”<sup>67</sup> and I think his candor about it is admirable. Indeed, the fact that the marriage debate has moved so quickly, and public support for marriage equality risen so rapidly, has created a challenge for scholars analyzing the debate in real time. At a minimum, the fast pace of change means that it is wise for anyone studying the issues to revisit and reassess, rather than clinging to earlier expressed opinions.

The more ambivalent assessment he offers in the book strikes me as on much more solid ground than the earlier writing. I have argued elsewhere that approaches to backlash that make categorical assumptions about the involvement of courts in contested policy issues can be both too generalized (in positing that court decisions will reliably generate backlash under a relatively general set of circumstances)<sup>68</sup> and too particularized (in treating backlash against courts as different in kind from other kinds of political backlash).<sup>69</sup> Moreover, the idea of backlash itself must be disaggregated. As we see in the context of the marriage debate, the widespread *policy* backlash reflected in DOMA and scores of anti-marriage-equality measures in the states was not accompanied by a similar *public opinion* backlash. To the contrary, favorable opinion has grown sharply over time.<sup>70</sup> As we think about the role of courts, then, it is crucial to remember that the Hawaii courts started the debate at a time when the issue of same-sex marriage was nowhere near the political or cultural radar.<sup>71</sup> Courts entered the marriage debate years before any majoritarian institution would have. It would be erroneous to say that courts therefore “caused” the skyrocketing public support for marriage equality over the last several years, but it is fair to say that courts crucially *ignited* a movement that otherwise looked to be years away. Decisions like *Goodridge* and those in the next few states that adopted same-sex marriage as a result of a court decision are, moreover, responsible for another effect: the *reality*, as opposed to the frightening *possibility*, of married same-sex couples. What has the effect of that reality been? It seems safe to say that it has not had the same effect on all observers, but it is reasonable to hypothesize that it has increased public support because those marriages have simply not had the kind of palpable and catastrophic social effects that some opponents had predicted.

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65. *Id.* at 208.

66. *Id.* at 223.

67. *Cf. id.* at 196 (noting that Barack Obama had said several times that his views on same-sex marriage were “evolving”).

68. Schacter, *Politics of Backlash*, *supra* note 22, at 1217.

69. *Id.* at 1218.

70. *Id.* at 1219–23.

71. *Id.* at 1220.

The central point here is that it is very difficult to draw clean causal arrows from point A to point B when exploring something as complex as the same-sex-marriage debate, which has involved multiple institutions (courts, legislatures, direct democracy, and electoral politics), multiple venues (local, state, and federal), and multiple domains (cultural, political, and social). The challenges of mapping actions to consequences in such circumstances lie at the heart of a book committed to better understanding the dynamics of antijudicial backlash, yet those challenges are formidably difficult. For the most part, Klarman skillfully acknowledges the complexity and the ambiguous picture of simultaneous progress and retrenchment for supporters of marriage equality. At points, as he enumerates the adverse developments for the LGBT community following *Baehr* and *Goodridge*, one is left with a vague sense that he would like to return to the more critical stance he took in 2005 toward early litigation. But his conclusions at the end of the book are more balanced and nuanced, and ultimately more persuasive, than was his earlier analysis.

Are there larger lessons here for the way scholars think about constitutional law and theory? My answer is: on some points, yes; on others, maybe. The way the marriage debate has unfolded can be read to suggest that we take a fresh look at some staples of constitutional law. But on some points, there are reasons to wonder if the marriage debate is too idiosyncratic to warrant much generalization.

First, as I have suggested above, the marriage debate illustrates the perils of reductionism in explaining cause and effect in the context of court decisions. Too often, debates about the consequences of controversial constitutional cases devolve into misleading questions about whether courts “can” or “cannot” produce meaningful social change. Take Gerald Rosenberg’s well known book, *The Hollow Hope*,<sup>72</sup> in which he pitted the romantic myth of a “Dynamic Court” (one able and willing to pursue needed change even when elected officials won’t) against his revisionist reality of the “Constrained Court” (one unable to do so).<sup>73</sup> Though controversial in some of its particulars, the book is a leading work on litigation as a means of social change. In 2008, Rosenberg published a second edition of *The Hollow Hope* that incorporated the same-sex marriage debate into his analysis.<sup>74</sup> The original edition of Rosenberg’s book in 1991 emphasized *Brown v. Board of Education*<sup>75</sup> and *Roe v. Wade*,<sup>76</sup> arguing that observers misattribute to those decisions (and others) more impact than they actually had, and that changes

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72. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

73. *Id.* at 10–27.

74. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) [hereinafter ROSENBERG 2008].

75. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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

brought about by political institutions are both necessary to achieve lasting change, and less likely to backfire.<sup>77</sup> In his second edition, Rosenberg ardently defended this same view about same-sex marriage litigation:

Ultimately, the use of litigation to win the right to same-sex marriage lends further support to the argument that courts are severely limited in their capacity to further the interests of the relatively disadvantaged . . . . By litigating when they did, proponents of same sex marriage moved too far and too fast ahead of the curve, leaping beyond what the American public could bear. The lesson here is a simple one: those who rely on the courts absent significant public and political support will fail to achieve meaningful social change, and may set their cause back.<sup>78</sup>

In support of this conclusion, Rosenberg relied on the fact that, as of the time he wrote, full marriage equality had not migrated beyond Massachusetts.<sup>79</sup> He also considered the case for several possible “indirect” benefits of litigation, but rejected most of them.<sup>80</sup> He concluded, for example, that there was more media coverage of same-sex marriage as a result of litigation, but that much of it was negative; that there had been no rise in contributions to gay rights groups that could be attributed to the marriage litigation; and that, on his reading, public opinion about same-sex marriage had not changed substantially between 1992–2006.<sup>81</sup>

Rosenberg’s work has been influential and is impressive in many ways, but he seems far too committed to the purity of his institutional claim to acknowledge the complexity and ultimate ambiguity of the dynamics in play. I have argued elsewhere that Rosenberg’s approach to courts fails to appreciate the murkiness of what might constitute social change.<sup>82</sup> I have argued, as well, that when applied in the area of LGBT rights, his approach fails to account for significant instances in which judicial action supporting equality has escaped backlash, and the actions of politically accountable institutions have provoked it. Examples, among others, are the successful litigation to secure adoptive rights for same-sex partners in nearly half the states in the country (producing no backlash),<sup>83</sup> and newly elected President Bill Clinton’s attempt to open the military to gays in 1993 (producing strong backlash).<sup>84</sup>

The marriage debate strongly suggests the need for a less dogmatic, more pragmatic approach—one that recognizes the ways in which judicial

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77. ROSENBERG, *supra* note 72, at 107–56, 228–46.

78. ROSENBERG 2008, *supra* note 74, at 419.

79. *Id.* at 353–54.

80. *Id.* at 355–419.

81. *Id.* at 360–61, 382–407.

82. Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 868 (2006) [hereinafter Schacter, *Social Change*].

83. *Id.* at 875–78.

84. Schacter, *Politics of Backlash*, *supra* note 22, at 1218–19.

action can generate both progress and backlash at the same time. Indeed, one takeaway from Klarman's book is that *how* one judges the wisdom of beginning a battle in court can depend critically on *when* the judging takes place. The aftermath of litigation can look very different based on when it is assessed. The time that elapsed between the *Baehr* decision in 1993 and *Goodridge* in 2003 would support a fairly bleak assessment. Most of the activity had been in the form of anti-equality, backlash measures on the federal and state level.<sup>85</sup> In the pursuit of marriage equality, only the Vermont Supreme Court's 1999 decision leading to civil unions marked any significant progress during this time and, of course, by today's standards, it looks fairly retrograde.<sup>86</sup> While *Goodridge* marked a stunning victory, it was quickly followed by another round of state ballot measures designed to head off *Goodridge*-clone rulings in other states.<sup>87</sup> With the marriage issue achieving new salience in the 2004 election, anxieties about backlash were perhaps at their peak. Indeed, it was in the wake of this election that Klarman, in his 2005 article, seemed to come down more on the Rosenberg side of the ledger.

Looked at from 2012, though, the picture is dramatically different. Indeed, Rosenberg himself said in his second edition that his analysis might be "overtaken by events."<sup>88</sup> And so it seems to have been. It is instructive to consider what happened between 2007 (the last year for which Rosenberg reported new developments)<sup>89</sup> and February 2012 (the end of the period addressed at all by Klarman).<sup>90</sup> These events alone might explain why Klarman is, justifiably, more restrained in his critique of litigation than is Rosenberg. Eight states plus the District of Columbia adopted full marriage equality, some by judicial action, others by legislative action. These were Connecticut (2008), California (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), District of Columbia (2010), New York (2011), Maryland (2012), and Washington (2012).<sup>91</sup> Even though the California state supreme court's ruling was wiped out by Prop 8 later in 2008,<sup>92</sup> and the legislative actions by both Maryland and Washington were put to voter referenda later

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85. See KLARMAN, *supra* note 1, at 57–68 (recounting federal and state legislation after *Baehr* limiting recognition of gay marriages and defining marriage as between a man and a woman).

86. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

87. KLARMAN, *supra* note 1, at 105.

88. ROSENBERG 2008, *supra* note 74, at 341.

89. *Id.* at 351.

90. Klarman's last historical chapter ends in 2011, but his conclusion addresses some developments in early 2012. KLARMAN, *supra* note 1, at 223.

91. Connecticut, California, and Iowa legalized same-sex marriage by judicial action. Vermont, New Hampshire, the District of Columbia, New York, Maryland, and Washington did so by legislative action. For details, see *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last updated Nov. 8, 2012) and *Relationship Recognition for Same-Sex Couples in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE, [http://www.thetaskforce.org/downloads/reports/issue\\_maps/rel\\_recog\\_11\\_7\\_12\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_11_7_12_color.pdf) (last updated Nov. 7, 2012).

92. *California*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/california>.

in 2012,<sup>93</sup> the eruption of marriage equality in several different parts of the country in this time period is quite striking. In addition to states moving to marriage equality, four states began to recognize same-sex marriages performed in other states;<sup>94</sup> four states adopted comprehensive civil unions;<sup>95</sup> and three states adopted limited relationship protections for same-sex couples.<sup>96</sup>

There was, to be sure, some further retrenchment between 2007 and February 2012. In addition to the enactment of Prop 8, both Arizona and Florida passed anti-same-sex-marriage amendments in 2008.<sup>97</sup> But even taking account of these, the national map on relationship recognition for same-sex couples came to look vastly different between the Rosenberg second edition and the Klarman book. Also conspicuously “overtaken” was Rosenberg’s claim that public opinion on marriage had not changed much since 1992. That claim was questionable even as of 2007,<sup>98</sup> but by the time of Klarman’s book, it simply fell outside any range of plausibility.

The trend continues, moreover, for the picture has changed substantially *even since* the end of the period covered by Klarman. Consider a few data points. Not unreasonably, Klarman rated it unlikely that President Obama would announce support for same-sex marriage before the election,<sup>99</sup> yet the President did exactly that in May 2012.<sup>100</sup> In addition, for the first time, supporters of marriage equality prevailed at the ballot box on Election Day 2012, as measures in four states that opposed marriage equality were all rejected by voters.<sup>101</sup> True, an anti-marriage amendment had carried in North Carolina by a large margin in June 2012,<sup>102</sup> but the Election Day four-state sweep reflected major change and might one day be seen as a tipping point.

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93. Frank Bruni, *A Big Test for Gay Marriage*, N.Y. TIMES (Oct. 8, 2012, 8:36 PM), <http://bruni.blogs.nytimes.com/2012/10/08/a-big-test-for-gay-marriage/>.

94. These were Rhode Island, Maryland, New Mexico, and Illinois. *Relationship Recognition for Same-Sex Couples in the U.S.*, *supra* note 91.

95. These were Washington, Nevada, Illinois, and Delaware. *Id.*

96. These were Colorado, Maryland, and Wisconsin. *Id.*

97. *Arizona*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/arizona>; *Florida*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/florida>.

98. Schacter, *Politics of Backlash*, *supra* note 22, at 1193–94.

99. KLARMAN, *supra* note 1, at 223.

100. Noam Cohen, *The Breakfast Meeting: Obama Stops ‘Evolving’ on Same-Sex Marriage*, MEDIA DECODER, N.Y. TIMES (May 10, 2012, 8:56 AM), <http://mediadecoder.blogs.nytimes.com/2012/05/10/the-breakfast-meeting-obama-stops-evolving-on-same-sex-marriage/?ref=samesexmarriage>.

101. Stuart Elliott, *After Success on Same-Sex Marriage, Gay Rights Group Uses Ad to Keep Pressure On*, MEDIA DECODER, N.Y. TIMES (Nov. 25, 2012, 5:59 PM), <http://mediadecoder.blogs.nytimes.com/2012/11/25/after-success-on-same-sex-marriage-gay-rights-group-uses-ad-to-keep-pressure-on/>.

102. Bruni, *supra* note 93.

And the upward trend in public support for same-sex marriage is, if anything, seemingly accelerating.<sup>103</sup>

What has followed litigation in *Baehr* and *Goodridge*, then, is both dramatic retrenchment and dramatic progress. At the very least, this ambiguous picture challenges any simple faceoff like the one Rosenberg posits between a romantic and a revisionist notion of courts. It suggests that it was neither a brilliant tactic nor a grave mistake that the campaign for marriage equality began with litigation. In showing that judicial decisions can both further and undermine social change, and can do these two things simultaneously, one point comes across clearly: courts rarely act in a vacuum. What courts do is necessarily mediated and communicated through politics, social movements, media, popular culture, and any number of other forces. How those forces interact, and the trajectory that interaction creates for the social change sought, is likely to be complex and deeply contextual, and to defy easy mapping. It also cannot necessarily be predicted in advance by those who see litigation as all virtue or all vice. Finally, the trajectory will not be the same for all. Consider the regional and cultural differences that have long characterized the marriage debate and help to explain why marriage equality has come to some states far sooner than others and, conversely, why some states have been more prone to backlash than others.<sup>104</sup>

A second point driven home by the marriage debate is that academic inquiries about the capacity of courts to generate social change have often been excessively focused on the United States Supreme Court. *Brown* and *Roe* are canonical examples, but they are not the only ones.<sup>105</sup> As the marriage debate now moves to the Supreme Court, perhaps the names *Perry* and *Windsor* may be added to that pantheon. But the virtue of Klarman's book (and other studies of same-sex marriage) being published before the Court issues any pronouncements on the issue is that it chronicles the two decades of judicial developments, overwhelmingly in state courts, that preceded the Court's entry. This was by the express design of LGBT-rights litigators, who elected to stay out of federal court for nearly twenty years. True, *Lawrence* was decided only a few months before *Goodridge*, and several of the justices' opinions gestured in some way toward same-sex

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103. For one 2012 poll with dramatic results, see Neil King Jr., *WSJ/NBC Poll: Majority Now Backs Gay Marriage*, WALL ST. J. (Dec. 13, 2012, 12:38 PM), <http://blogs.wsj.com/washwire/2012/12/13/wsjnbc-poll-majority-now-backs-gay-marriage/> (showing the NBC/Wall Street Journal poll reflecting a twenty-one point rise in support since 2004).

104. For example, Virginia, Texas, and Utah each passed three separate anti-marriage-equality measures at various points in time. *Texas*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/texas>; *Utah*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/utah>; *Virginia*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/virginia>.

105. See ROSENBERG 2008, *supra* note 74, at 292–93, 303–04 (discussing the Supreme Court's role in the “[r]eapportionment [r]evolution” and in extending procedural rights to criminal defendants).

marriage.<sup>106</sup> But the drivers of the debate were *Baehr* and *Goodridge* and, to a lesser extent, some of the state supreme court cases that followed those crucial firsts. What is missed by an excessive focus on the Supreme Court? One important point is that this focus offers only one very familiar picture of the well-known countermajoritarian difficulty.<sup>107</sup> In that picture, the justices are appointed with life tenure, and, most of the time, they are reviewing the actions of elected officials, whether legislative or executive. While Hawaii and Massachusetts likewise have appointed judges, California and Iowa, for example, have systems in which judges have to face the voters in some way.<sup>108</sup> In many states, moreover, the voters have recourse to direct democracy to enact policy and to counter judicial actions<sup>109</sup> and, of course, in the Prop 8 case, the marriage ban under review was passed by voters, not by a legislature. These institutional differences do not eliminate the countermajoritarian difficulty, but they do recast it in certain ways. The fact that some judges face voters might, on some views, mitigate the anxieties of countermajoritarianism.<sup>110</sup> The fact that voters have enacted laws on same-sex marriage directly might either exacerbate or mitigate that difficulty, depending on the normative posture one takes about direct democracy. In any event, these institutional factors merit notice and study.

The role of state courts in the marriage debate does, however, reflect one respect in which the marriage cases might be somewhat idiosyncratic. Unlike many other matters litigated in state courts, this one was nationalized very quickly.<sup>111</sup> The Supreme Court did not decide a marriage case between 1993–2012, but as Klarman effectively conveys, the issue nevertheless commanded the national stage and triggered a debate about judicial activism comparable to the one triggered by major Supreme Court cases. That owes, at least in part, to how nationalized the larger debate about LGBT rights

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106. See *Lawrence v. Texas*, 539 U.S. 558, 585 (O'Connor, J., concurring in judgment) (arguing that Texas's sodomy laws are not supported by a legitimate state interest such as "preserving traditional marriage"); *id.* at 604 (Scalia, J., dissenting) (warning that the Court's decision will lead to the "judicial imposition of homosexual marriage").

107. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (acknowledging that when the Supreme Court declares a legislative or executive act unconstitutional, it "thwarts the will of representatives" elected by the majority). For a historical perspective, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 258–62 (2009).

108. *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.com/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state=).

109. See *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., [http://www.iandrinstitute.org/statewide\\_i%26r.htm](http://www.iandrinstitute.org/statewide_i%26r.htm) (listing twenty-seven states that allow voters to place measures on the ballot through initiatives and/or referenda).

110. See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1129 (2010) (offering a historical perspective on countermajoritarianism and elected judges).

111. See Schacter, *Politics of Backlash*, *supra* note 22, at 1183–93 (discussing national scope of debate following the *Baehr* ruling in 1993).



already was when the marriage controversy first appeared. It is also related to the idea that a couple married in one state would seek recognition in others.<sup>112</sup> With interstate travel being routine, a similar dynamic might have some role to play in other contested areas—say, abortion or public benefits—but the idea of a chain reaction in the realm of marriage has a particularized purchase of its own.<sup>113</sup>

Finally, the marriage debate also poses some very fundamental questions about standard doctrinal approaches to constitutional law. A staple of federal equal protection and due process review has been the issue of choosing the appropriate standard of review. This has played out, as well, in the marriage arena, with virtually all the state courts adopting some version of the relevant federal constitutional doctrine and attending to the standard of review.<sup>114</sup> But the state cases, taken as a whole, suggest that this inquiry does not count for all that much. They are all over the map on standard of review. For example, cases overturning state marriage statutes have been decided at every level of equal protection review—rational basis, intermediate, and strict scrutiny.<sup>115</sup> Similarly, the two circuits that have struck down DOMA on equal protection grounds employed different levels of review.<sup>116</sup> This variability suggests that all the attention paid to level of review, and all the thousands of pages written about it in briefs about marriage equality, may prove to have been mostly a sideshow.

Moreover, significant conceptual problems with one particular aspect of the scrutiny issue are thrown into high relief in the marriage litigation. One prong of the analysis traditionally used to decide whether to heighten scrutiny is an inquiry into whether the group is politically powerless, such that aggressive judicial review is necessary to protect the group's interest.<sup>117</sup> This issue was, in fact, the subject of extended expert testimony in the federal court trial on Prop 8's constitutionality.<sup>118</sup> As I have suggested elsewhere, issues about the political power or powerlessness of the LGBT community reveal enigmatic aspects of this part of the doctrine. Among the vexing questions made salient by the marriage debate are how to measure political power, how to account for the fact that groups may develop some measure of political power only because they are subjected to special discrimination in

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112. *Id.* at 1185.

113. *Id.*

114. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (holding that because a same-sex marriage prohibition fails a rational basis test the court need not determine whether a strict scrutiny test is warranted).

115. Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1381 (2011).

116. The First Circuit employed a version of rational basis review. Mass. U.S. Dep't of Health, 682 F.3d 1, 10–11 (1st Cir. 2012). The Second Circuit employed intermediate scrutiny. Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012), *cert. granted* 133 S. Ct. 786 (Dec. 7, 2012).

117. Schacter, *supra* note 115, at 1372.

118. *Id.* at 1383.

the first instance, how to assess a history that includes both political victories and political defeats, and how to understand the extension of heightened scrutiny to race- and sex-based classifications notwithstanding the fact that racial minorities and women have won significant political and legislative battles.<sup>119</sup>

Indeed, the election of 2012 is likely to pose further questions about what it means for LGBT persons to have or to lack political power. Recall that supporters of the marriage equality side won on four of four ballot measures on Election Day (having lost in North Carolina in June of 2012). Recall, as well, that the President endorsed marriage equality before the election and paid no obvious political price for doing so. Indeed, the issue was not raised by his Republican opponent—a stunning contrast to the election of 2004, in which President Bush used his opposition to marriage equality as a prominent issue, and Republicans perceived great strategic advantage in getting the issue on the ballot in thirteen states that year.<sup>120</sup> Finally, in 2012, Representative Tammy Baldwin, an openly lesbian candidate in Wisconsin, was elected to the Senate.<sup>121</sup>

The events of the 2012 election are likely to be aggressively argued as evidence of the growing political power of the LGBT community. This will not and should not resolve the doctrinal question of political powerlessness at a time when thirty states still have laws banning same-sex couples from marrying in their constitutions and several other states have statutory bans,<sup>122</sup> most states do not include sexual orientation in their antidiscrimination laws,<sup>123</sup> and antigay hate crimes statistics are on the rise.<sup>124</sup> But the election results are likely to complicate the conversation. And that is consistent with what I take to be a central lesson from the marriage debate and from Klarman's book: There are no easy institutional answers or lessons here. Embrace the complexity.

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119. *See id.* at 1390–96 (describing the problems with political process theory in the context of the marriage debate).

120. Jonathan Capehart, *Silence Is Golden on Gay Issues*, WASH. POST (Oct. 22, 2012), [http://www.washingtonpost.com/blogs/post-partisan/post/silence-is-golden-on-gay-issues/2012/10/21/60427dea-1baa-11e2-ba31-3083ca97c314\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/silence-is-golden-on-gay-issues/2012/10/21/60427dea-1baa-11e2-ba31-3083ca97c314_blog.html).

121. Michael M. Grynbaum, *Fickle Wisconsin Sends a Trusty Progressive to the Senate*, N.Y. TIMES, Nov. 9, 2012, [http://www.nytimes.com/2012/11/10/us/politics/fickle-wisconsin-sends-tammy-baldwin-to-senate.html?\\_r=0](http://www.nytimes.com/2012/11/10/us/politics/fickle-wisconsin-sends-tammy-baldwin-to-senate.html?_r=0).

122. *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand>.

123. *State Nondiscrimination Laws in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE, [http://www.thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_1\\_12\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf).

124. Danielle Ryan, *Hate Crimes Down in 2011, But Anti-Gay Violence Is Up, FBI Says*, L.A. TIMES, Dec. 10, 2012, <http://articles.latimes.com/2012/dec/10/nation/la-na-fbi-hate-crimes-20121211>.