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SAUL ALINSKY AND THE LITIGATION CAMPAIGN TO WIN THE RIGHT TO SAME-SEX MARRIAGE

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I. INTRODUCTION: ALINSKY'S UNDERSTANDING OF HOW TO BRING ABOUT SOCIAL CHANGE

Saul Alinsky would be disgusted by the litigation campaign to win the right to same-sex marriage. This is not because he opposed same-sex marriage, although he might well have, but rather because litigation is the antithesis of Alinsky's approach to bringing about social change. The rally cry of the Back of the Yards Neighborhood Council, founded by Alinsky and Joseph Meegan in 1939, was, "[w]e the people will work out our own destiny,"[1] not, "leave it to the lawyers." In the material that follows, I argue that Alinsky's understanding of the mechanisms by which social change is made is fundamentally at odds with the litigation campaign for marriage equality. I argue, further, that while some gains have been made through litigation, it has set back the cause of marriage equality for at least a generation. I conclude by suggesting that litigation to win the right to same-sex marriage is not unique and that, as Alinksy would likely urge, litigation on behalf of the disadvantaged rarely, if ever, makes sense as a strategy for change.

Alinsky believed that making social change requires involving and empowering people. For Alinsky, change was the product of "debate and discussion; agendas and bylaws; elected representatives and collective action."[2] That does not happen when lawyers bring cases. Rather, people are shunted to the side as lawyers prepare briefs, engage in court proceedings, and focus questions of fairness and justice in narrow and restrictive legal language. Courthouses are not typically the venue for the kind of demonstrations and protests that Alinsky favored. Citizen engagement in litigation is limited to hearing the occasional talk about how the case is going: talks that are about what the lawyers

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1. SANFORD D. HORWITT, LET THEM CALL ME REBEL: SAUL ALINSKY – HIS LIFE AND LEGACY xiii, 408 (1989).

2. *Id.* at 109.

have done for you, not what you have done for yourself. Alinsky's colleague and organizer, Doug Still, explained Alinsky's approach this way: "Saul [Alinsky] felt strongly that you don't patronize people but instead have them experience their own authority and practice their own power. The assertion of personal value is the core of his whole philosophy."[3] That does not happen when people are bystanders to litigation.

For Alinsky, the "hero of this glorious undertaking"[4] of making change is the organizer, not the litigator. In his nearly 600-page study of Alinsky's life and work, Horwitt stresses that for Alinsky, "fundamentally the organizer's goal was to create a setting in which victimized people could experience and express their self-worth, power, and dignity."[5] This does not happen when lawyers are bringing cases instead of organizing communities. Indeed, Horwitt makes no mention of courts or litigation as a strategy for change that Alinsky supported. The only reference to litigation is defensive, on how the Alinsky-founded Temporary Woodlawn Organization ("TWO") responded when slum landlords went to court to stop rent strikes. Here, Horwitt reports, "[a]ll TWO wanted was to have friendly judges assigned to these cases—which well-connected committeemen could arrange—who would grant postponements to TWO's lawyers. If the postponements continued more or less indefinitely, TWO's organizers had a good chance to win their rent strikes."[6]

Alinsky was inspired by the confrontational actions and tactics of John L. Lewis, leader of the militant Congress of Industrial Organizations ("C.I.O.") in the 1930s, who he called his "old friend and tutor."[7] Alinsky even wrote a biography of Lewis.[8] Both Lewis and Alinksy believed that confrontation was essential to making change. Alinsky "insisted that power—not reason—was fundamental to the achievement of social change . . . ."[9] Courts, of course, deal with latter, not the former. And the only confrontation that occurs in a courtroom is between opposing lawyers or, perhaps, a lawyer and a single witness.

In 1971 Alinsky published *Rules For Radicals: A Practical Primer for Realistic Radicals*.[10] His aim was to be the Machiavelli of the left. As he wrote early in the book, "*The Prince* was written by Machiavelli for the Haves on how to hold power. *Rules for*

3. *Id.* at 383.
4. *Id.* at 174.
5. *Id.*
6. *Id.* at 404.
7. SAUL D. ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 136 (1971).
8. SAUL ALINSKY, JOHN L. LEWIS, AN UNAUTHORIZED BIOGRAPHY (1949).
9. HORWITT, *supra* note 1, at xv.
10. ALINSKY, *supra* note 7.

Radicals is written for the Have-Nots on how to take it away."[11] Throughout the book, Alinsky stresses that change comes from power and power comes from mass organizations. His aim is to set out rules for "how to create mass organizations to seize power and give it to the people."[12] This is the antithesis of litigation.

In a chapter labeled "Tactics," Alinsky sets out thirteen rules for successful organizing for change.[13] None of them has anything remotely to do with litigation. Further, a number of them are at odds with a litigation strategy for change. For example, Alinsky's fifth rule is *"Ridicule is man's most potent weapon."*[14] He illustrates this rule with examples of poking fun at those in power. For instance, when trying to organize the poor black community in Rochester, New York, his response to claims by the then corporate giant Eastman Kodak company, headquartered in Rochester, that it had done a great deal to help the community, was to tell the press, "the only thing Eastman Kodak has done on the race issue in America has been to introduce color film."[15] Alinsky writes that the reaction from Kodak was "shock, anger, and resentment . . . . They were not being attacked or insulted—they were being laughed at, and this was insufferable."[16] Courts and judges are not in the ridicule business, and to the extent that ridicule is a potent instigator of change, litigation will not contribute to it.

Ridicule, of course, depends on public support to work most effectively. If the corporate executives of Eastman Kodak, the white leadership of Rochester, and the white population in general thought there was nothing unfair about the conditions under which blacks lived, then Alinsky's comments would have fallen flat. They might have helped energize the black community, but with economic and political power so firmly entrenched, that might not have been sufficient to bring about change. As Alinsky gained more experience, he came to understand that change required broad support, be it in organizing particular communities or pressuring particular industries such as grape growers through the successful national grape boycott led by Cesar Chavez, an Alinsky student.[17] In the last chapter of *Rules for Radicals*, appropriately titled, "The Way Ahead," Alinsky makes this point explicit. He writes, "even if all the low-income parts of our population were organized . . . it would not be powerful enough to get . . . needed changes."[18]

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11. *Id.* at 3.
12. *Id.*
13. *See id.* at 127-30 (listing the thirteen rules).
14. ALINSKY, *supra* note 7, at 128.
15. ALINSKY, *supra* note 7, at 137.
16. *Id.*
17. HORWITT, *supra* note 1, at 533.
18. ALINSKY, *supra* note 7, at 184.

Alinsky's sixth rule is that a "good tactic is one that your people enjoy."[19] Mass protests can be exciting and fun in a way that litigation can never be. Litigation, by its very nature, is narrow, focused, and dry. For example, Alinsky describes an action to force a downtown Chicago department store to hire more African-Americans. Rather than bring a lawsuit, Alinsky laid plans to bring three thousand well-dressed, well-mannered, African-Americans into the store on a busy Saturday shopping day. They would fill the store, from the aisles to the counters to the dressing rooms. It would have been a lot of fun.[20] Before the day came, however, the plan was purposely leaked to the department store. Alinsky was contacted with an "urgent request" to meet with store executives before the Saturday in question. Alinsky reports that the store's personnel policies were "drastically changed," and 186 new jobs were created. "For the first time," Alinsky writes, "blacks were on the sales floor and in executive training."[21] The planned shopping day was called off.

Alinsky's seventh rule is one he "cannot repeat too often."[22] It is that a "tactic that drags on too long becomes a drag."[23] He credits this to human nature. Litigation, by its very nature, is slow. It can take years for cases to be heard, decided, and appealed. Legal challenges virtually guarantee that litigation will drag on. If change comes from mass movements, and if keeping participants energized and involved is an ongoing challenge, then litigation is likely to undercut change organizations.

There are many examples of Alinsky's strategy in action, such as the department store protest noted above, that highlight these points. They are the antithesis of litigation. Horwitt writes of a "quintessentially Alinsky" tactic to "pressure slum landlords . . . who refused to repair heating systems or broken water pipes."[24] Rather than filing a lawsuit, TWO set up picket lines. But "instead of picketing in front of the slum building in Woodlawn,"[25] Alinsky writes that TWO "selected its blackest blacks and bused them out to the lily-white suburb of the slum landlord's residence."[26] The point was to enrage the landlord's white neighbors to such an extent that they would pressure the landlord to make repairs.[27]

19. *Id.* at 128.
20. *Id.* at 146-48.
21. *Id.* at 148.
22. *Id.* at 159.
23. *Id.* at 128.
24. HORWITT, *supra* note 1, at 406-07.
25. *Id.* at 407.
26. ALINSKY, *supra* note 7, at 144.
27. *Id.*

Similarly, in order to pressure banks to reveal the names of slum landlords, Alinsky did not bring a lawsuit. Rather, TWO threatened to send black people into banks in very large numbers to open very small bank accounts.[28] The idea was to tie up the banks for several days, scaring off white customers and bringing operations to a halt. If this tactic failed to force the banks to reveal the names, the new customers would return and close their accounts, again creating havoc.

These and similar examples[29] underscore how different Alinksy's tactics for bringing change are from litigation. They involve public protests, not private court cases; they involve thousands of ordinary people, not just a few lawyers; and they are about people acting to empower themselves, not a handful of lawyers claiming power on their behalf. They target specific individuals, not general laws and practices.[30] They disrupt everyday practices and involve shock and ridicule. Perhaps most importantly, they are premised on the belief that for change to occur it is the disadvantaged themselves who must organize and act to demand it. Real change involves ordinary people taking their rights, not top-down pronouncements of rights from judges. Although the language is a bit awkward, Alinsky approvingly quotes Finley Peter Dunne's Mr. Dooley's advice: "[d]on't ask f'r rights. Take thim. An' don't let anny wan give thim to ye. A right that is handed to ye fer nawthin has somethin the mather with it. It's more thin likely it's only a wrrong turned inside out [sic]."[31] For Alinsky, then, there were rules for radicals who wished to extend benefits to those to whom they were denied. As he put it, "there are certain central concepts of action in human politics that operate regardless of the scene or the time."[32] With this background, I turn now to the litigation movement for same-sex marriage.

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28. ALINSKY, *supra* note 7, at 162-63; HORWITT, *supra* note 1, at 407-08.

29. One example involves mass protests to create pressure on the Superintendent of the Chicago public schools to release school enrollment statistics. HORWITT, *supra* note 1, at 405-06. Another Alinsky tactic was threatening a "shit-in" at O'Hare airport (taking over all of the bathroom stalls and urinals) to force the city of Chicago to honor commitments made to TWO. ALINSKY, *supra* note 7, at 142-44. Finally, students would deposit wads of chewed gum all over campus to pressure college officials to loosen rules. *Id.* at 145-46.

30. Alinsky underscores this point, writing that the "important point in the choosing of a target is that it must be a personification, not something general and abstract such as a community's segregated practices." ALINSKY, *supra* note 7, at 133.

31. ALINSKY, *supra* note 7, at 124.

32. ALINSKY, *supra* note 7, at xviii.

II. LITIGATION TO WIN THE RIGHT TO SAME-SEX MARRIAGE

Gays are a small minority in the U.S. who have suffered from, and continues to suffer from, discrimination. One area in which gay men and lesbians have been treated differently than and unequally from heterosexuals is marriage. Put simply, throughout American history, heterosexuals have been expected and encouraged to marry while gay men and lesbians have been prohibited from marrying. To many people, this unequal treatment denies gays equality, treating them as second-class citizens. Thus, for at least some members of the gay community, marriage equality is a long-standing goal.

The campaign for marriage equality between heterosexuals and gay men and lesbians has been waged largely in the courts. On the one hand, this seems sensible since until the first decade of the twenty-first century there were no legislatures that could be considered even remotely likely to extend marriage to gay men and lesbians. With the legislative route to social change blocked, same-sex marriage proponents turned to the courts. Several cases were brought in the 1970s but to no avail.[33] On the other hand, from an Alinsky perspective, litigating to win the right to same-sex marriage appears to violate many of his rules for radicals. In particular, it doesn't involve members of the gay community who are spectators rather than participants in litigation. It is an elite, top-down strategy for change based on legal reasoning, not political power. In addition, it takes a great deal of time, not making it conducive to movement building. Importantly, it offers the promise of victory without the political support necessary to make judicial victory a political reality. An Alinsky framework suggests that litigation to win the right to same-sex marriage would be unlikely to succeed, even if court cases were won.

The fortunes of same-sex marriage litigators turned in 1993. That year, in *Baehr v. Lewin*,[34] the Hawaii Supreme Court held that Hawaii's denial of marriage licenses to gay men and lesbians, absent a compelling justification, violated the State Constitution's guarantee of equal protection of the laws. In order to defend the law, the Hawaii Supreme Court held that the state needed to demonstrate to the trial court on remand that the marriage

33. Losing suits were brought in Minnesota, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), Kentucky, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973), and Washington, Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). A similar fate met a case argued in 1993 in the courts of the District of Columbia, Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995). Same-sex marriage was also implicated in cases dealing with immigration status in Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980) and divorce of an asserted common-law marriage in De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. 1984).

34. 852 P.2d 44, 67 (Haw. 1993).

statute "is justified by compelling state interests and . . . is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."[35] In 1996, the trial court held in *Baehr v. Miike*[36] that the state had failed to meet this burden and ordered the state to issue marriage licenses to same-sex couples.

At first blush, the court victory in Hawaii appears to repudiate Alinsky's arguments. Evan Wolfson, co-counsel in the case, as well as others, argued that in order to comply with the Full Faith and Credit Clause[37] of the U.S. Constitution, other states would be required to recognize same-sex marriages performed in Hawaii.[38] Celebrating the victory, Wolfson wrote that *Baehr v. Lewin* (1993) was "nothing less than a tectonic shift, a fundamental realignment of the landscape, possibly the biggest lesbian and gay rights legal victory ever," a breakthrough case that most might see as gay people's *Loving v. Virginia*.[39] If Wolfson was right, then litigation to win the right to same-sex marriage was a brilliant strategic move.[40]

In 1999, same-sex marriage proponents in Vermont also made headway. In *Baker v. State*,[41] the Vermont Supreme Court held that the state's refusal to issue marriage licenses to gay men and lesbians violated the Common Benefits Clause of the Vermont Constitution.[42] To remedy the violation, the Court turned to the

35. *Id.*

36. No. 91-1394-05, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

37. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST., art. IV, § 1.

38. Koppelman labels this claim a "fundamental misconception," noting that states have "always had the power to decline to recognize marriages from other states, and they have been exercising that power for centuries." ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 117-18 (2006).

39. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights For Lesbians and Gay Men and the Intra-Community Critique,* 21 N.Y.U. REV. L. & SOC. CHANGE 567, 572 (1994). In a seminal 1967 case, the United States Supreme Court held that anti-miscegenation laws (laws prohibiting inter-racial marriage) were unconstitutional. Loving v. Virginia, 388 U.S. 1, 12 (1967).

40. *But see infra* note 108 and accompanying text (finding that no marriage licenses were ever issued to same-sex couples because Hawaii voters amended the state Constitution to give the legislature the authority to limit marriage to heterosexuals, which the legislature promptly did).

41. 744 A.2d 864 (Vt. 1999).

42. The Common Benefits Clause reads: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." VT. CONST., ch. I, art. 7.

state legislature, affording it a limited time to act. The Court held that as long as the legislature created a status that granted gays "all or most of the same rights and obligations provided by the law to married partners," such as a "domestic partnership" or "registered partnership" arrangement, the Vermont Constitution would be satisfied.[43] The legislature acted in April of 2000, passing legislation granting gay men and lesbians the right to form civil unions.[44] Although Vermont civil unions are not marriage, they grant same-sex couples "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage."[45]

On November 18, 2003, same-sex marriage litigators won their biggest victory then to date. In *Goodridge v. Department of Public Health*,[46] the Supreme Judicial Court of Massachusetts held that Massachusetts could not "deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."[47] The Court gave the legislature 180 days to change the law.[48] After much wrangling,[49] the legislature complied; on May 17, 2004, the fiftieth anniversary of *Brown v. Board of Education*,[50] the first same-sex marriages were legally performed in the United States.

Change has also occurred in at least seven other states since the *Goodridge* decision. The states of New Jersey[51] and New Hampshire[52] adopted civil unions. New Jersey acted in response to a decision of the New Jersey Supreme Court ordering the legislature to guarantee gay men and lesbians marriage rights.[53] Interestingly, New Hampshire acted without judicial pressure. Connecticut also adopted civil unions,[54] acting without judicial pressure. That status, however, did not last long. In October of

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43. *Baker*, 744 A.2d at 886.

44. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 344-47 (2d ed. 2008) (discussing the events in Vermont leading up to the enactment of the civil unions law).

45. VT. STAT. ANN. tit. 15, § 1204(a) (1999).

46. 798 N.E.2d 941 (2003).

47. *Id.* at 312.

48. *Id.* at 344.

49. *See* DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 33-72 (2006) (discussing the political machinations involved).

50. 347 U.S. 483 (1954).

51. NPR, *State by State: The Legal Battle Over Gay Marriage*, Apr. 16, 2009, http://www.npr.org/news/specials/gaymarriage/map/index.html [hereinafter *NPR State by State*].

52. Josh Rogers, New Hampshire Approves Gay Civil Unions, National Public Radio (NPR), Apr. 26, 2007, http://www.npr.org/templates/story/story.php?storyId=9852764.

53. Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006).

54. *See NPR State by State*, *supra* note 51 (reporting that Connecticut legalized same-sex civil unions in April, 2005).

2008, the Connecticut Supreme Court struck down the state's civil union law, holding that same-sex couples have a constitutional right to marry.[55]

In addition to civil unions and marriages, five other states and the District of Columbia have expanded the rights offered to same-sex couples. In the states of Maine and Washington as well as in the District of Columbia, same-sex couples are offered at least some of the same rights that accrue to married heterosexual couples.[56] Oregon has gone further, offering same-sex couples the right to enter into contractual relationships that grant them the same benefits that state law offers to married couples.[57] And then, there is California. Starting in 1999, the legislature enacted three progressively broader measures extending rights to same-sex couples.[58] The last measure permitted same-sex couples (and some opposite-sex couples over the age of sixty-two) to register as domestic partners and receive all of the state-level rights and responsibilities of marriage.[59] But California's ban on same-sex marriage was invalidated by the California Supreme Court in May 2008,[60] and as of June 2008, same-sex couples were granted marriage equality.[61] However, in the 2008 election, the voters of California enacted Proposition 8, amending the California Constitution to limit marriage to heterosexual couples.[62] The California Supreme Court heard a constitutional challenge to the

55. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008).

56. Nat'l Conf. of St. Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships*, Apr. 2009, http://www.ncsl.org/programs/cyf/samesex.htm [hereinafter *NCSL Overview*]. *See also NPR State by State*, *supra* note 51 (listing the status of same-sex couples' rights in each state).

57. *NPR State by State*, *supra* note 51; *NCSL Overview*, *supra* note 56.

58. *See* Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality*, 17 HASTINGS WOMEN'S L.J. 39, 44 (2006) (outlining the legislative measures California took in extending rights to same-sex couples).

59. CAL. FAM. CODE §§ 297-297.5 (West 2003). However, on March 7, 2000, California voters approved Proposition 22 (the "Knight Initiative"), amending the Family Code to state: "[o]nly marriage between a man and a woman is valid and recognized in California." Toni Broaddus, *Vote No If You Believe in Marriage: Lessons from the No on Knight/No on Proposition 22 Campaign*, 15 BERKELEY WOMEN'S L.J. 1, 1 (2000). The Proposition was approved with sixty-one percent of the votes and carried fifty-two of fifty-eight counties, only falling short in six counties in the San Francisco Bay area. California 2000 Primary Election Proposition 22 - Limit on Marriage, California Secretary of State, http://primary2000.sos.ca.gov/returns/prop/mapR022.htm (last visited Apr. 29, 2009).

60. In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

61. *NPR State By State*, *supra* note 51.

62. Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2008, at A1.

proposition in early March 2009 and, by a vote of 6–1, upheld it.[63]

What would Alinsky make of these actions? On the one hand, prior to litigation, no state provided same-sex couples anything remotely equivalent to marriage rights. In the years since the Hawaii litigation, however, eleven states and the District of Columbia have changed their laws to provide either same-sex marriage (Massachusetts, Connecticut, Vermont, New Hampshire and Iowa), civil unions (New Jersey), domestic partnerships that grant all the rights of marriage (California, Oregon), or limited domestic partner benefits (Hawaii, Maine, Washington, District of Columbia).[64] The granting of these benefits, it could be argued, is a step forward. Same-sex couples have been granted rights ranging from hospital visitation and medical decision-making to health care coverage to inheritance when a partner dies without a will. On this characterization, litigation for same-sex marriage has had important, positive effects.

On the other hand, marriage equality has not been achieved. Even in Massachusetts and Connecticut (and California briefly), where state law provides identical treatment and the name "marriage," same-sex couples are denied over one thousand one hundred federal rights that accompany marriage.[65] Same-sex couples are not even separate but equal; rather, they are separate and unequal. As for civil unions, Steven Goldstein, director of Garden State Equality, a New Jersey gay-rights advocacy group, understands them in true Alinsky fashion: "Civil unions are nothing like marriage . . . The cockamamie contraption simply doesn't work. If civil unions were a person, they would be arrested for fraud."[66] Indeed, Lambda Legal, a self-described "impact litigation" group that has been involved in same-sex marriage litigation, argues that civil unions are profoundly "discriminatory" for a host of reasons.[67] Overall, then, while progress has been made, marriage equality has not been achieved.

If this were the whole story, Alinsky might still see it as a good start. Although he would worry about the lack of active

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63. Maura Dolan, *California Supreme Court Looks Unlikely to Kill Proposition 8*, L.A. TIMES, Mar. 6, 2009, at A1; Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

64. *See NPR State by State*, *supra* note 51 (mapping the state of same-sex couples rights state by state; *NCSL Overview*, *supra* note 56 (reporting the status of same-sex couples' rights).

65. *See infra* note 103 and accompanying text (reporting the results of a U.S. General Accounting Office report).

66. Christine Vestal, *Civil Unions Spread, but Gays Want to Wed*, STATELINE.ORG, May 31, 2007, http://www.stateline.org/live/details/story?contentId=212354.

67. Civil Unions Are Discriminatory, Lambda Legal, Nov. 1, 2006, http://www.lambdalegal.org/our-work/publications/facts-backgrounds/civil-unions-discriminatory.html.

involvement in litigation on the part of gay men and lesbians, Alinsky was at base a pragmatist. As a believer in creative public protests, he understood their limits also. For example, he relates a meeting with the head of a corporation who proudly showed him blueprints for a new plant. Much to Alinsky's chagrin, the blueprints included a self-described "sit-in" room where protesters would be offered coffee, television, clean rest rooms, and plenty of room. If others were to follow this example, Alinsky mused, "you can relegate sit-ins to the Smithsonian Museum."[68] What Alinsky wanted was results. As he wrote early in *Rules for Radicals*, the "man of action views the issue of means and ends in pragmatic and strategic terms."[69] So perhaps same-sex marriage proponents made the correct strategic and pragmatic decision to litigate. But this is not the whole story. When that story is told, as Alinsky might expect, the decision to litigate turns out to be deeply flawed.

III. NOT LISTENING TO ALINSKY: THE WRONG TACTIC AT THE WRONG TIME

Alinsky's core belief, as I have noted, was that people themselves need to feel and become empowered. Because litigation is an elite, top-down activity, it appears to be the antithesis of community organizing. But perhaps litigation is capable of creating a sense of empowerment by sparking political mobilization. In his study of the movement for pay equity, McCann argues that this might be the case. Litigation, McCann suggests, by providing a forum for protest and a language for grievances, can lead to "building a movement, generating public support for new rights claims, and providing leverage to supplement other political tactics."[70] Perhaps, then, the decisions in *Baehr*, *Baker*, and *Goodridge*, sparked mobilization across the country in favor of same-sex marriage. There is some evidence that supports this possibility.

One piece of evidence comes from the exuberant crowds that turned out in Massachusetts to witness and support the first same-sex marriages. In Boston, 10,000 people gathered outside of City Hall to witness the issuance of the first marriage license to a same-sex couple.[71] The City of Cambridge opened its City Hall just after midnight on May 17th to accept marriage license applications.[72] The historic event was preceded by a celebration with wedding cake and sparkling cider presided over by

68. ALINSKY, *supra* note 7, at 163.

69. *Id.* at 24.

70. MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10 (1994).

71. Yvonne Abraham & Rick Klein, *Free to Marry; Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1.

72. *Id.*

Cambridge's Mayor.[73] In the words of the first person to apply for a marriage license for herself and her partner, "[t]his is like winning the World Series and the Stanley Cup on the same day."[74]

Additional evidence supporting the role of litigation in spurring mobilization comes from actions taken by local officials in San Francisco, Sandoval County, New Mexico, New Paltz, New York, and Portland, Oregon. Despite the fact that marriages are regulated by state law, on February 12, 2004, not quite three months after the *Goodridge* decision, the city of San Francisco began issuing marriage licenses to same-sex couples.[75] San Francisco has a large gay population and the actions of Mayor Gavin Newsom were met with euphoria. Same-sex couples lined up for hours outside of the city clerk's office to apply for marriage licenses. A sympathetic city attorney described the scene this way:

> The atmosphere was one of elation and love and pride as people were going into the Clerk's office, after standing for many hours in line. . . . every time a couple came out of the Clerk's office with a license, people cheered. It was just an absolutely amazing experience. . . . I literally got chills every time I walked down that hallway. It was like nothing else I've ever experienced.[76]

From February 12th until March 11th, when the California Supreme Court issued an injunction ordering the city to stop issuing the licenses, San Francisco issued 4,037 marriage licenses to same-sex couples.[77]

In the wake of Mayor Newsom's actions, a few other local officials took similar steps. In Sandoval county, New Mexico, Victoria Dunlap, the county clerk, issued sixty-four marriage licenses to same-sex couples before the New Mexico Attorney General issued an opinion holding that the licenses were invalid under state law.[78] In late February, the twenty-seven-year-old mayor of New Paltz, New York, seventy-five miles North of New York City, began performing marriages for same-sex couples.[79]

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73. *Id.*

74. *Id.*

75. Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24.

76. PINELLO, *supra* note 49, at 81.

77. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26. However, on August 12, 2004 the California Supreme Court unanimously held that San Francisco exceeded its authority and violated state law in issuing the marriage licenses to same-sex couples. Lockyer v. City and County of San Francisco, 95 P.3d 459, 472 (Cal. 2004). The Court also held, by a five to two vote, that the same-sex marriages performed were void. *Id.*

78. PINELLO, *supra* note 49, at 19; *see id.* at 1-17 (discussing her motivations and the events of that day).

79. *See id.* (noting that Mayor West officiated twenty-four same-sex weddings).

When Mayor West was banned by court order from continuing to perform same-sex marriages, others stepped in, including six Unitarian Universalist ministers and the Deputy Mayor.[80] Overall, by mid-September of 2004, more than 200 marriages of same-sex couples had been performed.[81]

Similar actions were taken in Portland, Oregon.[82] Starting on March 3, 2004, Multnomah County, Oregon, began issuing marriage licenses to same-sex couples.[83] By the time the county was ordered by a judge to stop on April 20, 2004, it had issued 3,022 marriage licenses to same-sex couples.[84]

This brief presentation of the events in the few months following the *Goodridge* decision suggests that the judicial victory mobilized a few elected officials to issue marriage licenses to same-sex couples. It also suggests that litigation mobilized many same-sex couples. In his moving study of these events, Pinello concludes that "*Goodridge* brought about enormous social change" and "had a profound inspirational effect for the marriage movement, among elites and the grass roots . . . ."[85] Pinello argues that "the same-sex weddings in San Francisco, Portland, and elsewhere would not have occurred without the example of *Goodridge*."[86] Indeed, he argues that "*Goodridge* radicalized and coalesced the gay community like no other event since the advent of AIDS in the 1980s."[87]

One result of this mobilization may be the successful efforts in a few other states, either judicial or legislative, to win the right to same-sex marriage. As noted above, in the years since *Goodridge*, a number of states acted to extend benefits to same-sex couples. It may well be that same-sex marriage supporters were mobilized by the apparent success of *Goodridge* to press on with their cause.

Alinksy, I think, would be skeptical that these claims, even if correct, justified litigation as the right strategic choice to win the right to same-sex marriage. This is largely because the litigation strategy does not appear to have led to the building of a mass same-sex marriage organization. "Change," he wrote, "comes from

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80. Gabriel J. Wasserman, *West Barred from Gay Vows*, POUGHKEEPSIE JOURNAL, June 8, 2004, at 1A; Robert Sullivan, *Mayor with a Mission*, N.Y. TIMES, Mar. 28, 2004, at 638.

81. *Judge Won't Nullify Gay Marriages*, POUGHKEEPSIE JOURNAL, Sept. 17, 2004, at 1A.

82. *See* PINELLO, *supra* note 49, at 102-42 (discussing these and subsequent events in Oregon).

83. *Id.*

84. *Id.* As in California, the Oregon Supreme Court nullified the purported marriages. Li v. State, 110 P.3d 91, 102 (Or. 2005).

85. PINELLO, *supra* note 49, at 192.

86. *Id.*

87. *Id.* at 193.

power, and power comes from organization."[88] Where, Alinsky might ask, is the organizational movement, the grassroots about which Pinello so eloquently writes? While there are, of course, established gay rights groups such as Lambda Legal,[89] Gay & Lesbian Advocates & Defenders ("GLAAD"),[90] and the Human Rights Campaign ("HRC"),[91] they are elite-based groups that have approached same-sex marriage through litigation. They have rarely engaged in the kind of public protests around marriage equality that build mass organizations. Where there has been mobilization and mass protest, as around Proposition 8 in California, it has been episodic, reactive, and defensive.

But what about the actions of Mayor Newsom? Were not they the kind of creative, in-your-face, public protests that Alinsky supported? Did not they highlight the profound unfairness of denying loving couples the dignity, let alone the legal benefits, of marriage? The answer to these questions is no. Same-sex marriage litigators and their local government allies have made an enormous tactical blunder that has set back their goal of marriage equality for at least a generation. I turn now to showing why.

Saul Alinsky was a pragmatist. He analyzed the world from the vantage point of cold, hard, calculation. He was not under the spell of the romance of rights that so consumes most lawyers who seek change. He understood that pronouncements of rights were worthless without the political power necessary to implement them. "We must first see the world as it is and not as we would like it to be," he wrote.[92] Thus, he understood at a fundamental level that no change could succeed without broad public support. In trying to organize poor people he advised that "[t]actics must begin with the experience of the middle class."[93] Without broad support, attempts at change would backfire. Speaking of the violent anti-Vietnam war group the Weathermen, Alinsky said, "[t]he worst form of social treason is to stir up a reaction that is more damaging to you than to your enemy. The Weathermen should be getting paid by the extreme right for the work they do."[94] Stirring up a reaction that is more damaging to you than to your enemy is precisely what same-sex marriage litigators did.

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88. ALINSKY, *supra* note 7, at 113.

89. About Lambda Legal, http://www.lambdalegal.org/about-us/ (last visited Apr. 29, 2009).

90. GLAAD Mission Statement, http://www.glaad.org/Page.aspx?pid=269 (last visited Apr. 29, 2009).

91. About HRC, http://www.hrc.org/about_us/index.htm (last visited Apr. 29, 2009).

92. ALINSKY, *supra* note 7, at 12.

93. *Id.* at 195.

94. HORWITT, *supra* note 1, at 528.

Judicial victories in favor of same-sex marriage and public attempts to grant marriage licenses to same-sex couples in San Francisco and several other places, created a backlash of enormous proportions. As the Hawaii litigation unfolded in the 1990s, opponents of same-sex marriage adopted the claims of proponents, warning that if Hawaii granted gay men and lesbians the right to marry, the Full Faith and Credit Clause of the U.S. Constitution might require the recognition of such marriages in other states.[95] This concern was heightened by the *Goodridge* decision in November of 2003, legalizing same-sex marriage in Massachusetts.[96] Tim Nashif, a founder and director of the Oregon Family Council that opposed same-sex marriage, explained the fear of same-sex marriage opponents:

> Massachusetts was on the verge of legalizing same-sex marriage, not through the people but through the courts. So the question came up, if Massachusetts legalizes same-sex marriage, how do we deal with the fact that [gay and lesbian] Oregonians may be able to go to Massachusetts, get married, come back to Oregon, and then we have a situation in Oregon where there's this debate about whether these marriages should be recognized.[97]

As early as the Hawaii litigation, and given increasing urgency by the Vermont and Massachusetts judicial victories, opponents of same-sex marriage around the country began to organize. Their aim was to enact laws, on both the state and federal level, defining marriage in purely heterosexual terms as a union between one man and one woman and refusing to recognize out-of-state marriages between same-sex couples. These efforts proved extraordinarily successful.

On the federal level, opponents of same-sex marriage responded to the Hawaii litigation by enacting the "Defense of Marriage Act" ("DOMA") in 1996.[98] DOMA defines marriage as "only a legal union between one man and one woman as husband and wife" and acknowledges the right of each state to refuse recognition of out-of-state same-sex marriages despite the Full Faith and Credit Clause of the Constitution.[99] Introduced in an election year, DOMA passed the House and Senate by extraordinary majorities. In the House the margin was better than five to one (342-67), and in the Senate it was better than six

95. *But see* KOPPELMAN, *supra* note 38, at 118 (noting that the Full Faith and Credit Clause does not require recognition of same-sex marriages from other states). The claim was made repeatedly, however, either sincerely (although mistakenly) or as a rhetorical device to mobilize opponents.

96. *Goodridge*, 798 N.E.2d at 312.

97. PINELLO, *supra* note 49, at 107-08.

98. Defense of Marriage Act, Pub L. No. 104-199, § 3(a), 110 Stat. 2419 (1996).

99. *Id.*

to one (85-14).[100] As a result of the passage of DOMA, same-sex couples are denied all federal benefits that come with marriage.[101] They range from social security and tax benefits to housing and food stamps to employment benefits to inheritance.[102] In a 2004 report, the Government Accounting Office ("GAO") found that there were 1,138 federal statutory provisions in which benefits, rights, and privileges involved marital status and were thus inapplicable to same-sex couples.[103]

The passage of DOMA was just the beginning of the conservative backlash against same-sex marriage. On the state level, opponents of same-sex marriage mobilized to a virtually unprecedented degree, raising money across the country and lobbying state legislature to pass laws banning same-sex marriage. As of the end of 2008, all but six states—Connecticut, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island—had enacted laws prohibiting same-sex marriage.[104] Forty-one states in addition to the federal government have so-called "Defense of Marriage Acts," prohibiting same-sex marriages or the recognition of same-sex marriages formed in another jurisdiction.[105] Only three of those states had such language in their statute books before the Hawaii decision in 1996.[106]

There has also been mass conservative mobilization aimed at amending state constitutions to define marriage in heterosexual terms.[107] A large majority of states has considered amending their constitutions to ban same-sex marriage, and a majority has so acted. Hawaii was the first state to act, amending its Constitution in 1998 in the wake of the *Baehr* litigation, reserving the issue of same-sex marriage for legislative determination.[108] Alaska banned

100. DOMAwatch.org, Federal Defense of Marriage Act, http://www.domawatch.org/about/federaldoma.html (last visited on Sept. 2, 2009). DOMA Watch supports limiting marriage to heterosexuals.

101. Patricia G. Miller, *No Faith or Credit? Refusal to Recognize Same-Sex Marriages in Another State Could Mean Problems*, PITT. POST-GAZETTE, Dec. 21, 1996, at A11.

102. *Id.*

103. U.S. GENERAL ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

104. *NCSL Overview*, *supra* note 56. Four states—California, Nebraska, Nevada, and Oregon—have constitutional amendments limiting marriage to heterosexuals but no statutory law. *Id.*

105. *Id.*

106. *Id.*

107. There was also an attempt to amend the U.S. Constitution to prohibit same-sex marriage. However, it fell well short of the constitutionally required two-thirds vote in each House of Congress in order to be sent to the states for ratification. *See* ROSENBERG, *supra* note 44, at 365-67 (explaining the attempt to amend the U.S. Constitution to prohibit same-sex marriage).

108. *NCSL Overview*, *supra* note 56.

same-sex marriage by constitutional amendment in 1998,[109] and Nebraska did so in 2000.[110] In 2002, Nevada limited marriage to heterosexuals.[111] In the summer of 2004, Missouri and Louisiana voters overwhelmingly approved constitutional amendments, recognizing marriage only as between one man and one woman, with support from nearly seventy-one percent of Missouri voters[112] and eighty percent of voters in Louisiana.[113] These five states were just the tip of the iceberg.

In the 2004 general election, mobilized opponents of same-sex marriage succeeded in placing constitutional amendments banning it on the ballot in eleven states, ranging from Mississippi to Michigan and Oregon to Ohio.[114] In eight of these states (all except Mississippi, Montana, and Oregon), the amendments could be read to ban civil unions as well.[115] These eleven states were home to almost one-fifth of the electorate.[116] On election day in 2004, all the amendments were adopted, and almost all by lopsided majorities.[117] Only in Oregon (58.8%) and Michigan (58.6%) was support for the amendments below sixty percent and in more than half of the states support was over seventy percent.[118]

It appears that the *Goodridge* decision played an important

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109. *NPR State by State*, *supra* note 51; DOMA Watch, *Issues by State - Alaska*, http://www.domawatch.org/stateissues/alaska/index.html (last visited Apr. 29, 2009).

110. *NPR State by State*, *supra* note 51; DOMA Watch, *Issues by State - Nebraska*, http://www.domawatch.org/stateissues/nebraska/index.html (last visited Apr. 29, 2009).

111. *NPR State by State*, *supra* note 51; DOMA Watch, *Issues by State - Nevada*, http://www.domawatch.org/stateissues/nevada/index.html (last visited Apr. 29, 2009).

112. Kere Abraham, *Define and Conquer: What's Driving the Divisive Measure 36?*, EUGENE WKLY, Vol. XXIII, Issue 39, Sept. 30, 2004, at 14; *see also* Monica Davey, *Missourians Back Amendment Barring Gay Marriage*, N.Y. TIMES, Aug. 4, 2004, *available at* http://www.nytimes.com/2004/08/04/us/missourians-back-amendment-barring-gay-marriage.html; *Gay-Marriage Ban Passes in Louisiana*, N.Y. TIMES, Sept. 19, 2004, *available at http://query.nytimes.com/gst/fullpage.html?res=9B00E2D91439F93AA2575AC0A9629C8B63.*

113. *Id.*

114. *See* Nat'l Conf. of St. Legislatures, *Same-Sex Marriage Measures on the 2004 Ballot*, Nov. 17, 2004, http://www.ncsl.org/programs/legismgt/statevote/marriage-mea.htm [hereinafter *NCSL 2004 Ballot*] (listing the seven other states that had a constitutional amendment on their ballot: Arkansas, Georgia, Kentucky, Montana, North Dakota, Oklahoma, and Utah).

115. *Id.*

116. *See* July 1, 2004, U.S. Census Bureau Population Data, http://www.census.gov/population/www/ (providing statistics which allow the calculation to be performed).

117. *See NCSL 2004 Ballot*, *supra* note 114 (listing the percent of voters approving the measure in each state).

118. *Id.*

role in mobilizing same-sex marriage opponents to amend state constitutions. For example, the Ohio amendment was put on the ballot as a direct response to the *Goodridge* decision. On May 18, 2004, the day after the first same-sex marriages were performed in Massachusetts, Phil Burress organized a meeting of a conservative group, Citizens for Community Values, to consider how to make sure that same-sex marriage would not become legal in Ohio.[119] Stating that he was "[s]hocked by scenes from the Bay State," Burress and his group decided to propose and support an amendment to the Ohio Constitution banning same-sex marriage.[120] "We would not have had this on the ballot if they had not started marrying people on May 17," Burress said.[121]

Flushed with success, opponents of same-sex marriage continued to mobilize to amend constitutions to ban it. Kansas and Texas approved constitutional amendments in 2005,[122] and Alabama acted in early 2006.[123] On election day in 2006, eight states had such amendments on the ballot and seven were approved.[124] For the first time, however, a proposed amendment was defeated, albeit barely (fifty-one percent to forty-nine percent), in the state of Arizona.[125] But that was reversed in 2008 when voters in Arizona, as well as in California and Florida, adopted constitutional amendments prohibiting same-sex marriage.[126] Thus, as of the end of 2008, thirty states, home to 63.9% of the U.S. population, prohibit same-sex marriage by constitution.[127] In addition, in at least eighteen of those states the constitutional amendments can be read to prohibit civil unions or domestic partnerships as well.[128]

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119. Scott S. Greenberger, *Gay Marriage Ruling Pushed Voters: Mobilized Bush, Left Kerry Wary*, BOSTON GLOBE, Nov. 17, 2004, at B1.

120. *Id.*

121. *Id.*

122. Nat'l Conf. of St. Legislatures, *Timeline-Same Sex Marriages*, http://www.ncsl.org/programs/cyf/samesextime.htm [hereinafter *NCSL Timeline*] (last visited Apr. 29, 2009); NPR State By State, *supra* note 51.

123. *NCSL Timeline*, *supra* note 122.

124. *See* Nat'l Conf. of St. Legislatures, *Same-Sex Marriage Issues on the 2006 Ballot*, Nov. 12, 2006, http://www.ncsl.org/statevote/samesex_06.htm (listing the states with such amendments on their ballots: Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin).

125. *Id.*

126. *NCSL Overview*, *supra* note 56.

127. *See* July 1, 2008, U.S. Census Bureau Population Data, http://www.census.gov/population/www/ (providing statistics which allow the calculation to be performed). This count includes Hawaii, whose Constitution gives the state legislature the power to "reserve marriage to opposite-sex couples." *See NCSL Overview*, *supra* note 56. As noted, the Hawaii legislature did so act. *Id.*

128. *See NCSL Overview*, *supra* note 56 (listing Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and

There is also evidence that the presence of constitutional amendments banning same-sex marriage on the 2004 ballot in eleven states was a factor in re-electing President Bush.[129] This is particularly the case in Ohio where, if Senator Kerry had prevailed, he would have been elected President, albeit while losing the popular vote nationwide. Phil Burress, the instigator of the Ohio constitutional amendment, believes that it attracted people to the polls who also voted for President Bush. "The Massachusetts Supreme Court cost Kerry the election," Burress said.[130] "If we had not been on the ballot, Bush would not have won Ohio."[131]

Phil Burress was not alone in believing that same-sex marriage litigators' greatest victory furthered the re-election of President Bush. Robert Knight, director of the Culture & Family Institute and an opponent of same-sex marriage, saw it as the "great iceberg" in the election.[132] "A lot of analysts saw the tip but didn't understand the power of the mass underneath. It galvanized millions of Christians to turn out and vote, and George Bush and the GOP got the lion's share of that vote."[133] Perhaps tongue-in-cheek, Knight said that President Bush should send a bouquet to Margaret H. Marshall, the chief justice of the Massachusetts court and the author of the *Goodridge* decision, because she "did more than any other single person to assure his victory."[134]

Presidential advisor Karl Rove, widely considered a brilliant political strategist, reached a similar conclusion. He told reporters in post-election interviews that opposition to same-sex marriage was among the most powerful forces in American politics.[135] As Rove saw the 2004 election, the legalization of same-sex marriage in Massachusetts had "captured and colored the national imagination" throughout the country.[136] A *New York Times* reporter who interviewed him wrote that he "appeared to stifle a grin when asked whether he was 'indebted' to Mayor Gavin Newsom of San Francisco, who opened his City Hall to gay

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Wisconsin).

129. *See* ROSENBERG, *supra* note 44, at 369-82 (discussing this evidence).

130. Dan Ring, *No Backlash in Mass.: Offical May End Effort to Ban Gay Marriages*, THE REPUBLICAN (Springfield, MA), Nov. 5, 2004, at A01.

131. *Id.*

132. Carolyn Lochhead, *Gay Marriage: Did Issue Help Re-Elect Bush?*, S.F. CHRON., Nov. 4, 2004, at A1.

133. *Id.*

134. Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39, *available at* http://www.washingtonpost.com/wp-dyn/articles/A23672-2004Nov3.html.

135. ROSENBERG, *supra* note 44, at 369.

136. Jeff Zeleny, *Rove: Marriage Issue and Role of Money Were Big*, CHI. TRIB., Nov. 10, 2004, at 12.

marriages until he was blocked by a court, and to the Supreme Judicial Court of Massachusetts, for ruling that gay couples have a right to marriage."[137]

In litigating for same-sex marriage, litigators committed what Alinsky called "[t]he worst form of social treason . . . stir[ring] up a reaction that is more damaging to you than to your enemy."[138] Enamored by the romance of rights, they fundamentally misunderstood the politics of power. By bringing court cases because they lacked the political support required to win legislative battles, they virtually guaranteed that the political support necessary to protect legal victories would be missing. Like the Weathermen, who Alinsky suggested should be "paid by the extreme right for the work they do,"[139] same-sex marriage litigators inspired and mobilized their opponents to an unprecedented degree. In so doing, they created numerous statutory and constitutional barriers to same-sex marriage that did not exist before the successes of the litigation campaign. Today, in order to win marriage equality, the federal DOMA and laws in forty states must be repealed, and thirty state constitutions must be amended. Doing so will likely take a generation or more. This is the cost that same-sex marriage proponents must now pay for violating Alinsky's rules for radicals.

Proponents of litigation to win the right to same-sex marriage will undoubtedly protest this harsh assessment. They might argue, for example, that no one could have foreseen the extent of the conservative reaction to judicial victories. While this might conceivably have been the case prior to the Hawaii litigation, after the passage of DOMA in 1996 and similar legislation in dozens of states, litigators were on notice that any judicial victory would be met with a powerful and effective legislative opposition. Even before the Hawaii litigation, readers of Alinsky's[140] or my work[141] ought to have been wary of litigation. To continue to have pressed the litigation campaign forward is simply incomprehensible.

A second response to my harsh critique is to claim that although there has been an unfortunate backlash, litigation has accomplished a great deal. For example, as discussed above, in eleven states and the District of Columbia same-sex couples have more rights today than they did before the litigation campaign.[142]

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137. Adam Nagourney, *'Moral Values' Carried Bush, Rove Says*, N.Y. TIMES, Nov. 10, 2004, at 20.

138. HORWITT, *supra* note 1, at 528.

139. *Id.*

140. *See generally* ALINSKY, *supra* note 7 (implicitly criticizing the reliance on litigation for rights by not advocating it).

141. *See generally* ROSENBERG, *supra* note 44 (explicitly criticizing the reliance on litigation for rights).

142. *See supra* Part II (documenting the gains from the litigation campaign

Further, litigation supporters might suggest that litigation brought the issue of same-sex marriage to the public agenda. The issue is now discussed and debated in a way that was not happening before the litigation. In addition, they might claim that it has increased public support for same-sex marriage in particular and gay rights more generally. Are these claims defensible?

It is, of course, true that in a few states gay men, lesbians, and their partners have greater rights than they did before the litigation campaign started. But these have been gained at an enormous cost to gays everywhere else. Unless one happens to live in one of those places, it is now harder to gain marriage equality. It is hard to celebrate the benefits of the few when they are borne by the costs of the many.

As for media coverage, it does appear that same-sex marriage receives more media coverage than previously. Analysis of the *Reader's Guide to Periodical Literature* and the *New York Times* shows that over the period 1980-2004 the issue of same-sex marriage has received increasing media attention.[143] Nonetheless, the temporal distribution of that attention suggests that it is largely driven by opposition to same-sex marriage, not litigation in support of it.[144] Nearly seventy percent of the coverage in the *New York Times* over the twenty-five year period studied occurred in only the three presidential election years of 1996, 2000, and 2004.[145] Further, content analysis of *New York Times* entries shows that the coverage of same-sex marriage is substantially more negative than positive.[146] It is hard to see how media coverage of your opponents furthers your cause.

Has litigation increased public support for same-sex marriage? Overall, it is hard to make a strong case that litigation in support of same-sex marriage has substantially increased support for it.[147] For the most part, support for same-sex marriage has been increasing slowly with much of the change occurring before the *Goodridge* decision.[148] As for civil unions, in the years following *Goodridge*, approximately one-half of the American public was in support.[149] "This represents an increase of about ten percentage points since 2000 and somewhat more since the mid-

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for same-sex couples' rights).

143. *See* ROSENBERG, *supra* note 44, at 382-400 (analyzing the media coverage).

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.* at 400-07 and accompanying text (discussing public opinion on same-sex marriage).

148. *See id.* at 404 (arguing that the *Goodridge* decision does not seem to have increased public support for same-sex marriage).

149. *Id.* at 406.

1990s."[150] Public "[s]upport for civil unions is higher than support for same-sex marriage and civil unions are almost always the preferred position when respondents are asked to chose between them."[151] While this may be a response to litigation, it more likely is a reflection of the changes in societal views of gay rights, discussed below.

A third response to the critique of litigation is that proponents of same-sex marriage had no other alternatives. This view shows a poverty of imagination that would infuriate Alinsky. Strategies for change are not limited to either legislation or litigation. There is a wealth of social change tactics that gay rights groups have used with some success on other issues. These include everything from guerilla theater to films and television to political advertising. The gay community has no less of a share of creative people than other communities. But because the quest for same-sex marriage was taken over by lawyers, creativity was lost.

IV. WHAT IS TO BE DONE?

It is not hard to imagine a different strategy to win the right to marriage equality. It is premised on Alinsky's belief that change requires public support. For better or worse, most Americans see themselves as "middle class," average Janes and Joes. For change to be effective, at the very least it must have the acquiescence, if not the support, of these people. On the next-to-the-last page of *Rules for Radicals*, Alinsky writes, "Tactics must begin with the experience of the middle class . . . ."[152] For the Alinsky-educated same-sex marriage proponent, this may be good news. This is because over the last several decades there has been a dramatic change in societal acceptance of gay men and lesbians. Strategies based on this change have a chance to succeed.

The extent of change can be seen in many arenas, ranging from public opinion surveys to employment to television and movie treatment to societal understandings more broadly.[153] While discrimination still exists, it has diminished. Reviewing public opinion data in 2004, Karlyn Bowman finds an "enormous increase in tolerance" for gays over the last several decades.[154] The data show that since the 1970s the American public has become increasingly more accepting of and comfortable with the

150. *Id.* at 407.

151. *Id.*

152. ALINSKY, *supra* note 7, at 195.

153. *See* ROSENBERG, *supra* note 44, at 407-15 (noting the cultural changes in views about gays).

154. James Ricci & Patricia Ward Biederman, *Acceptance of Gays on Rise, Polls Show*, L.A. TIMES, Mar. 30, 2004, § B, at 1, *available at* http://articles.latimes.com/2004/mar/30/local/me-change30.

participation of gay men and lesbians throughout society.[155] Perhaps more importantly, the data show that younger people are the strongest supporters of gay rights.[156] For example, polls show that in 1997, several years before the Vermont and Massachusetts cases, half of college freshmen supported same-sex marriage.[157] By 2002, support had increased to fifty-nine percent.[158] And a 2001 national survey of 1,000 high school seniors reported even greater support (sixty-six percent) for same-sex marriage.[159] These polls suggest that support for same-sex marriage is likely to grow over time. As Evan Wolfson, executive director of Freedom to Marry, somewhat mischievously put it, "we have a secret weapon: death."[160]

Growing support for same-sex marriage is not unique to the United States.[161] There is a worldwide movement for change. "The Netherlands legalized same-sex marriage in 2001, followed by Belgium in 2003, most Canadian provinces between 2003 and 2005, Spain and Canada as a whole in 2005, South Africa in 2006,"[162] and Norway in 2008.[163] In addition, approximately twenty countries permit same-sex civil unions as do several cities such as Buenos Aires, Argentina, and Mexico City, Mexico.[164]

Changes in public opinion in the U.S. towards same-sex marriage, and around the world, are primarily the result of changing cultures. It is likely that changing cultural understandings have provided much of the support for civil unions and same-sex marriage. And if these trends continue, as the data suggest they will, it is possible, if not likely, that over time support for same-sex marriage will increase sufficiently to make it politically feasible to enact. This makes it all the more tragic that litigation became the main strategy of same-sex marriage proponents. By litigating for same-sex marriage before the majority was ready for it, litigators moved too fast and too far ahead of Alinsky's middle class, inevitably creating backlash. The

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155. *Id.*

156. *Id.*

157. KARLYN BOWMAN & BRYAN O'KEEFE, ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 23 (2004), *available at* http://www.aei.org/docLib/20050520_HOMOSEXUALITY0520.pdf.

158. *Id.* at 23.

159. Ricci & Biederman, *supra* note 154.

160. Evan Wolfson, Marriage Equality and Some Lessons for the Scary Work of Winning, Address to the Nat'l. Lesbian & Gay Law Ass'n. "Lavender Law" Conference (Sept. 30, 2004), *available at* http://www.freedomtomarry.org/pdfs/Scarywork.pdf.

161. ROSENBERG, *supra* note 44, at 415.

162. *Id.*

163. Catherine Stein, *Same Sex Marriage Law Passed by Wide Majority*, AFTENPOSTEN (Norway), June 12, 2008, http://www.aftenposten.no/english/local/article2479146.ece.

164. ROSENBERG, *supra* note 44, at 415.

executive director of the National Gay and Lesbian Task Force, Matt Foreman, acknowledged this after the 2004 election where eleven constitutional amendments banning same-sex marriage were adopted: "there is no putting lipstick on this pig . . . . Our legal strategy is at least 10 years ahead of our political and legislative strategy."[165] The result of litigation under such conditions has set back the movement rather than produced positive change.

The lack of sufficient political support to turn judicial pronouncements into political reality is well illustrated by considering the exuberant reaction of same-sex litigator Evan Wolfson to the Hawaii decision noted earlier. In comparing it to *Loving v. Virginia*, Wolfson inadvertently highlights the many ways in which same-sex marriage legal victories are radically different. For example, it was the Supreme Court of the United States that struck down anti-miscegenation laws in *Loving*, while the first three same-sex marriage victories came from two of the smallest and least representative states of the union (Hawaii and Vermont) and one of the most liberal ones (Massachusetts). More importantly, when the Supreme Court decided *Loving*, only sixteen states banned inter-racial marriages while at the time of *Baehr*, *Baker*, and *Goodridge* no state permitted same-sex marriages. In addition, *Loving* was preceded by the passage of the 1964 Civil Rights Act, prohibiting race-based discrimination in employment and accommodations.[166] There has been no such major national legislation prohibiting discrimination against gays and lesbians. Wolfson's comparison shows how dramatically different the conditions were between *Loving* and the same-sex marriage cases. They underline how bringing the *Loving* case made sense while litigating for the right to same-sex marriage did not.

As Alinsky would no doubt argue, different conditions require different strategies. By assuming that litigation would produce a right for all seasons, same-sex marriage litigators sparked a powerful opposition. Indeed, perhaps the most fascinating result of the litigation has been the stunningly successful counter-mobilization against same-sex marriage. I have found such a pattern before in cases like *Brown* and *Roe* where the losers in court mobilized and effectively stymied change.[167] One of the most important lessons, then, that comes from litigation for marriage

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165. Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at 16, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A06E6DE163FF931A25752C1A9629C8B63.

166. Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 701, 78 Stat. 253 (codified as 42 U.S.C. §§ 2000e to e-17).

167. ROSENBERG, *supra* note 44, at chs. 4 and 6.

equality is that litigation on behalf of the relatively disadvantaged, if successful, is likely to be met with powerful political resistance. Thus, the political insulation of the judiciary, the very attribute that allows the relatively disadvantaged to have their day in court, also limits the efficacy of judicial victories. It is a sad catch-22 situation that proponents of issues like same-sex marriage face.

What, then, should proponents of same-sex marriage have done? While hindsight is twenty-twenty, building on the cultural changes taking place would have made sense. For example, as Americans have become more accepting of gay men and lesbians, it is likely that they have become more sensitive to issues of discrimination and fairness. A same-sex marriage campaign based on these notions might have made headway. Instead of litigating, what if same-sex marriage advocates had launched an advertising campaign featuring famous athletes, who happen to be gay, speaking about how unfair it is that they are not allowed to marry their partners? Imagine a Super Bowl ad, with a clip of some great play made in an earlier Super Bowl. The player might talk about how proud he is to have played in a Super Bowl and have made that play. Perhaps he could turn to his partner and talk about how proud he is of their relationship. Then, he could point out that although he and his partner love each other very much and have been together for a number of years, they are not allowed to marry. The advertisement might end with the athlete looking directly into the camera, asking, "is that fair?" I am not an advertising agent, so perhaps this is not a good idea. But my point is that strategies that build upon deepening understandings have a much better chance of success than those that do not.

If, however, proponents insisted on litigation, they would have done well to remember Alinsky's admonition that "to the organizer, compromise is a key and beautiful word."[168] This suggests that rather than litigating for same-sex marriage, proponents would have been wiser to litigate for greater benefits for same-sex couples. Such an incremental strategy builds on American's growing support for full participation for gay men and lesbians and would have been less likely to arouse intense opposition and more likely to succeed. There is an example that same-sex marriage proponents might have followed—the National Association for the Advancement of Colored People ("NAACP"). In attacking racial segregation, the NAACP did not, initially, directly challenge the separate-but-equal standard.[169] Although its goal

168. ALINSKY, *supra* note 7, at 59.

169. ROSENBERG, *supra* note 44, at 417. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) (examining the history of the legal fight against public school segregation and

was to end legal segregation, it understood that neither the courts nor the country were ready to dismantle it.[170] Instead, NAACP litigators worked incrementally, accepting the separate-but-equal standard and arguing that defendants were not providing equality.[171] As painful as this must have been to NAACP litigators, they followed the strategy for several decades, winning numerous cases.[172] Only then, were they ready to challenge the separate-but-equal doctrine itself. By analogy, if same-sex marriage proponents had the patience, discipline, and understanding of the NAACP, they might have won more by asking for less.[173]

I suspect that many supporters of same-sex marriage would be frustrated by this strategy. "How can you ask us," they might say, "to litigate for second-class status when gay men and lesbians are entitled to equal treatment and benefits?" The response is that the battle for same-sex marriage is not only about the rhetoric of rights but also about the reality of political power. The most poignant and powerful rights claims will fail without political support. And until that political support is present, litigation is likely to produce backlash.

V. CONCLUSION

Ultimately, the failure of litigation to win the right to same-sex marriage highlights Alinsky's most basic insights about how to bring about change. Almost every aspect of the structure and procedure of litigation mitigates against effective organizing and mobilization. In turning to courts, proponents of marriage equality confused the rhetoric of rights with the reality of reaction. To continue to litigate after 1996, when it was clear that any further litigation victories would produce continued backlash, was pure folly. The "lure of litigation" misled same-sex marriage litigators to move faster and farther than the American public was ready to go. When they won, they were unsurprisingly met with major opposition. 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.

For Saul Alinksy, there was no substitute for political action. As long as many of the brightest and most idealistic young people

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exploring the NAACP's litigation strategy). *See generally* Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083 (1988) (reviewing Tushnet's book from the perspective of one of the NAACP's litigators at the time and criticizing some of Tushnet's assertions).

170. ROSENBERG, *supra* note 44, at 417.

171. *Id.*

172. *Id.*

173. *Id.*

embark on legal careers and look to legal strategies to produce change, that change is unlikely to be achieved. Alinsky taught that community organizing and political mobilization may not be glamorous or pay six-figure salaries, but they are the best if not the only hope to produce change—not as a fallback position, not as a complement to a legal strategy, but as the strategy itself. Same-sex marriage activists had a choice about how to further their cause. In ignoring Alinsky's experience and arguments and choosing to litigate, they created additional barriers to the achievement of their goal of marriage equality. Alinsky would not be surprised.